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IN THE

Supreme Court of the United States

October Term, 1997

JOHN AND PATRICIA GLAVARIS; BENNY L. TOLLEY; JOEL BINDER; MARIT FIDEL; BERNARD FIDEL,
Petitioners,

vs.

HERBERT J. YOUNG; JAMES N. THAYER, JAY JANIS; JOHN R. WILLIAMSON; MICHAEL W. MOONEY; LYNNE CRAWFORD; LINDA K. S. BLOUNT; ROBERT R. SPRAGUE; HOUSTON I. FLOURNOY; BERNICE. HUTTER; MELVIN P. SPITZ; RAFAEL E. VEGA; GIBRALTAR SAVINGS; GIBRALTAR SAVINGS, F.A.; MELVIN RIFKIND; GIBSON DUNN & CRUTCHER; KPMG PEAT MARWICK; ALVIN KANG; ERNST & WHINNEY; ERNST & YOUNG; WILLIAM H. DUDLEY; MELVIN RIFKIND; RIFKIND, PONDEL & PARSON; KENNETH LEVENTHAL & COMPANY; RICHARD SPRAYREGEN; THE FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Gibraltar Savings and Gibraltar Savings, F.A.,
Respondents.

On Petition For Writ Of Certiorari
To The Ninth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In ruling on defendants' motions to dismiss under Rule 12(b)(6) in a Rule 23 action, is the court required to accept the plaintiffs' definition of the class as set forth in the complaint or is the court entitled to re-define the class into three separate classes, including where the court has previously refused to allow intervention by members of the class as named plaintiffs in respect of claims dismissed by the court as constituting claims represented by one of the classes defined by the court based on the lack of a separate representative plaintiff for each separate class period/claims and refused to allow any amendment of the complaint for the purpose of adding any new plaintiffs and class representatives?

In the instant case, the court first refused to allow members of the putative class to intervene as plaintiffs then, for purposes of ruling on the defendants' motions to dismiss, re-defined the class in a manner which the court determined resulted in the absence of a class representative for the particular period wherein the plaintiffs-in-intervention had sought to intervene (and the court subsequently refused to allow amendment of the complaint to allow intervention by any additional plaintiffs and class representatives even though proceedings in the case remained stayed pending final disposition of all motions to dismiss and, accordantly, no responsive pleadings had been filed and no discovery had been conducted).

2. In granting defendants' motions to dismiss, is the court entitled to refuse to apply Rule 23 tolling under this Court's *American Pipe* line of cases to preserve stockholder and bond holders claims against defendants who were named as defendants in a prior Rule 23 class action but who were dismissed for purposes of the settlement of stockholder only claims in such putative class action where the factual

allegations in such prior class action were sufficient to cover both stockholder and bondholder claims?

In dismissing the plaintiffs and the class' claims in what the court defined as "period 1", the court declined to apply Rule 23 tolling to the instant stock and bondholder claims under Rule 10b-5 even through such stockholder claims were against defendants who were originally named but had not participated in the prior class action settlement and the factual allegations in such prior class action covered both stock and bondholder claims but the settlement covered only stockholder claims against a certain limited number of defendants.

3. Was it error for the court to refuse to apply fraudulent concealment, equitable tolling and equitable estoppel theories to the facts and circumstances of this Rule 10b-5 case, including the court's refusal to suspend the plaintiffs' inquiry duty occasioned by the corporate defendant's announcement of large losses where the defendants purported to conduct a special investigation by the "outside" members of the corporation's board of directors and corporate counsel into the facts and circumstances surrounding such losses and publicly reported that such special investigation could find no evidence of any actionable conduct by corporate management?

In the instant case, the defendants had purported to cause a special independent investigation to be conducted into the matters which were the subject of the corporation's loss announcement (which press release the court determined constituted constructive notice of possible fraud) and, thereafter, reported that such special investigation could find no evidence of any actionable conduct by the corporation's management. Nevertheless, the court declined to apply principles of fraudulent concealment, equitable tolling or equitable estoppel to preclude the defendants from asserting that such (constructive notice) statute of limitations in respect

of the plaintiffs' Rule 10b-5 and other claims continued to run following announcement of the findings of the special investigation thereby cutting-off the plaintiffs' claims by approximately two weeks before the action was filed.

4. Are actions by professional defendants such as accountants, attorneys and financial public relations firms, who participate directly in the fraudulent activity of corporate defendants, cognizable under Rule 10b-5 notwithstanding the fact that the plaintiffs are unaware at the time that such professionals were involved in the making of such false or misleading statements or other wrongful conduct?

In the instant case, the court dismissed plaintiffs' Rule 10b-5 claims against the corporation's accountants, attorneys and financial public relations firm, which professional defendants were direct participants in the fraudulent statements and conduct alleged in the complaint, on the basis that there was no public attribution of any of the alleged false and misleading public statements to any of such defendants and that such defendants could not be held liable for any "non-verbal" conduct under Rule 10b-5.

5. Were the plaintiffs entitled to the benefit of favorable inferences to be drawn from the allegations of a "pattern of racketeering activity" as set forth in the complaint to establish for pleading purposes a RICO association-in-fact "enterprise"?

The court dismissed the plaintiffs' RICO claims without leave to amend based on the court's determination that the complaint failed to adequately allege the "enterprise" element of such claim in that the plaintiffs were not entitled to plead the existence of such enterprise based in whole or in part on inferences drawn from the allegations of the pattern of racketeering activity alleged in the complaint.

LIST OF PARTIES

All parties appear in the caption as presented on the facing page of this petition.

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment below including the court's order denying the intervention by petitioners Binder and Fidel in the *Glavaris* action.

OPINIONS BELOW

The memorandum decision of the United States Court of Appeals for the Ninth Circuit and order denying rehearing appear, respectively, as Appendix A and B to this petition.

The memoranda of decision of the United States District Court for the Central District of California (Mariana R. Pfaelzer District Judge, Presiding) dated September 8, 1992 and August 10, 1994 appear, respectively as Appendix D and E.

JURISDICTION

The date on which the United States Court of Appeals for the Ninth Circuit issued its order denying the petition for rehearing was June 2, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The primary basis for jurisdiction in the District Court was under 15 U.S.C. §78aa (Rule 10b-5 claims), and 18 U.S.C. §1964 (c) (RICO claims).

STATUTES, REGULATIONS AND RULES INVOLVED

This petition implicates Federal Rules of Civil Procedure ("FRCP") Rules 12(b)(6) and 56 and Rules 23 and 24(a) in respect of the petitioners' submissions that the District Court was not entitled to re-define the putative class, to differ from the definition of the class set forth in the complaint for purposes of such court's dismissal of the plaintiffs and the class' Rule 10b-5 and other class claims and preclude intervention by members of the putative class at the outset of the case. However, the precise language of

the above referenced Rules does not appear to directly impact on the Court's decision in respect of the within petition; and, accordingly, such Rules are not reproduced in this section of the petition. The same is true of Section 10(b) and Rule 10b-5 in respect of the petitioners' submission that claims may be maintained against persons who were not identified or otherwise known to the claimants to have been violating such statute and rule at the time of such violation.

RICO "Enterprise"

18 U.S.C. §1961(6)

> "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity"

18 U.S.C. §1962(c)

> "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprises affairs through a pattern of racketeering activity or collection of unlawful debts"

STATEMENT OF THE CASE

The petitioners purchased Gibraltar Financial Corporation's ("GFC") common stock ("stock") and public

debt securities ("bonds") in the public trading market for such securities during the period January 1, 1986 through April 30, 1989, and thereafter. GFC was a publicly owned holding company for its Gibraltar Savings & Loan subsidiary based in Beverly Hills, California ("Gibraltar Savings") which S&L was GFC's only meaningful asset and business (collectively herein "Gibraltar"). Gibraltar Savings was one of the fifteen largest U.S. savings and loans. In its annual report for 1985, and thereafter, Gibraltar indicated that it would emphasize variable rate mortgages to avoid interest rate risk, and that its commercial real estate investments were valued quarterly for financial statement purposes based on appraisals and comparisons of value. *(Gibraltar did not really have any such appraisals or comparisons of value, and such representation was entirely false).* Following a public announcement by Gibraltar on October 30, 1987, that it was taking an after tax charge of approximately $155 million in respect of anticipated losses attributable to its commercial real estate development activities, Gibraltar announced in its year-end 1987 Annual Report To Stockholders, and otherwise publicly disclosed, that it was in sound financial condition and would be profitable in 1988. Gibraltar's October 30, 1987 release, Gibraltar's 3rd Quarter financial statements and Gibraltar's 1987 year-end financials, did not mention any other losses or anticipated losses. Prior to the date of such press release, on October 20, 1987, Gibraltar and its board members and attorneys received a written report following special audit by the FHLB (Federal Home Loan Bank of San Francisco), which agency had regulatory authority over Gibraltar, reporting that the FHLB had concluded that Gibraltar Savings was in an "unsafe and unsound" financial condition as a result of unreported losses attributable to Gibraltar's portfolio of fixed-rate mortgage backed securities equal to approximately $500 million. *(The October 30th release was an instrument of the Gibraltar fraud in that it did not disclose the true nature, timing and*

reason for the real estate losses which were reported therein and did not report the existence of losses attributable to Gibraltar's portfolio of fixed rate mortgage-backed securities which losses, the FHLB had concluded, rendered Gibraltar "unsafe and unsound").[1/] In the 1st Quarter of 1989,

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[1/] The October 30th release stated, in pertinent part, as follows: "Beverly Hills, California - - October 30, 1987 - - Gibraltar Financial Corporation (NYSE:GFC) announced today that is accelerating plans to focus on its traditional core savings and loan business. To accomplish this, GFC has commenced a program to expedite the sale of real estate investments and has provided for anticipated losses on sale . . . Herbert J. Young, Chairman and Chief Executive Officer, stated: "These actions are intended to improve future net interest income and profitability". The decision to phase out its construction and development activities and to expedite the disposal of real estate investments, rather than to continue to hold them for investment, required a $147.1 million third quarter writedown. The Company also recorded a $92.0 million third quarter provision for loan losses primarily associated with commercial real estate properties that did not meet occupancy, lease and/or sales projections.

Due primarily to the foregoing writedown and provision for losses, the Company incurred a net loss for the third quarter of $154.6 million, compared with net earnings of $13.3 million in the corresponding quarter last year . . . Total assets at September 30, 1987 amounted to $14.3 billion".

The financial press reporting on such release did not even speculate as to any wrong doing by Gibraltar's management in respect of the subject matter of the announcement, namely Gibraltar's decision in the 3rd Quarter of 1987 to discontinue its commercial real estate development and loan business and to expedite the sale of its commercial real estate assets in a manner which it was anticipated would result in substantial losses. The reporting of large losses, even very large losses, does not by itself implicate wrongdoing by corporate management - - let alone the corporation's outside accountants, attorneys and financial public relations firm. The release, issued by Gibraltar during the aftermath of the October 19, 1987 market "crash", was an instrument of the Gibraltar fraud - - which fraud permeated the artificial time periods constructed by the court.

Gibraltar announced losses from operations for 1988 of approximately $101 million. It was not until January of 1989 that Gibraltar first publicly announced that the FHLB had concluded that Gibraltar was "unsafe and unsound" as a result of substantial losses attributable to its portfolio of fixed rate mortgage-backed securities. Shortly thereafter, the FDIC (Federal Deposit Insurance Corporation) acting as agent for the FSLIC (Federal Savings and Loan Insurance Corporation), and subsequently the RTC (Resolution Trust Corporation) (collectively herein sometimes the "Government"), placed Gibraltar Savings into a conservatorship and subsequently into a receivership which resulted in the liquidation of such savings and loan business. In the process, in May of 1989, the Government used a previously undisclosed capital maintenance agreement with GFC to seize all of GFC's cash resources on deposit with Gibraltar Savings, which in turn forced GFC to default on interest and principal payments on its publicly owned/traded bonds. GFC sought the protection of the U.S. Bankruptcy Court, but its efforts to reorganize were unsuccessful, and GFC was ultimately liquidated. As a result of the Government's seizure of Gibraltar Savings and of GFC's cash resources, and the resulting bankruptcy and liquidation of GFC, the petitioners' and the other owners of Gibraltar's stock and bonds received virtually nothing and lost their entire investment in Gibraltar securities. The *In re Gibraltar* Rule 10b-5 class action was filed and eventually settled as to stockholder claims against a certain limited number of the defendants named in such action, namely defendant Young. Gibraltar's bondholders, approximately 5,000 investors, have never recovered any amount in respect of their claims.

Although not reported or otherwise disclosed until after the settlement of the *In re Gibraltar* class action, it was ultimately revealed as a result of litigation by Mercatura Trust which was one of GFC's largest stockholders and an

"opt-out" from the stockholder class action settlement, that (1) Gibraltar had in hand the FHLB's written report dated October 16, 1987, assessing unreported losses attributable to Gibraltar Savings' portfolio of fixed rate mortgage-backed securities at $500 million and determining that Gibraltar Savings was "unsafe and unsound" - - on October 20, 1987 - - which report was received prior to the issuance of Gibraltar's October 30, 1987 real estate loss announcement, (2) Gibraltar had issued two different versions of its 1986 Annual Report To Stockholders including audited consolidated financial statements for the year ended December 31, 1986 - - one of which (filed with the U.S Securities and Exchange Commission) showed that Gibraltar Savings' largest real estate development project (the Metairie Galleria) had been sold out and transferred off of Gibraltar's consolidated Balance Sheet at December 31, 1986 and one of which (mailed to stock and bondholders) reflected that such real estate development project was owned by Gibraltar at December 31, 1986 and was being held as a long-term investment, without disclosing the existence of such two different sets of annual reports/financial statements, (3) the independent appraisals and comparisons of value, upon which Gibraltar had been representing its real estate assets were valued for financial reporting purposes, did not exist, (4) in September of 1986 Gibraltar had actually refused to take delivery of and had cancelled an independent real estate appraisal on its largest single real estate property as referenced above because such appraisal reflected that Gibraltar Savings had suffered a loss in respect of its investment in such property in excess of $30 million wiping out substantially all of the $49 million in "record earnings" reported by Gibraltar for the year ended December 31, 1986, (5) no audit of Gibraltar's single largest real estate property, the Metairie Galleria, had been conducted for purposes of the issuance of the audit report and opinion on the second version of Gibraltar's 1986 consolidated financial statements

reflecting Gibraltar Savings' ownership of such property, (6) the Government regulatory agreement, which required GFC to maintain the minimum regulatory capital of its Gibraltar Savings subsidiary as required from time to time under applicable law and which was used as the basis for the Government's seizure of all of GFC's cash resources in May of 1989, had been in existence since as early as May of 1987, and (7) that, in light of the Government regulators' determination that Gibraltar Savings was "unsafe and unsound", such regulators had notified Gibraltar in December of 1987 that they had serious concerns about Gibraltar Savings' ability to continue as a going concern.

None of the foregoing facts were reported or otherwise disclosed by Gibraltar for the benefit of its securities holders or prospective public investors. Notwithstanding receipt in October of 1987 of the FHLB's written report and determination that Gibraltar Savings was "unsafe and unsound" as a result of unreported losses attributable to Gibraltar Savings' portfolio of fixed rate mortgage-backed securities in excess of $500 million, GFC's 1987 Annual Report To Stockholders issued in early 1988 stated, in two places in Young's "President's Letter To Stockholders", that Gibraltar was in sound financial condition. To the contrary, GFC was dependent upon the cash it received from (and maintained on deposit with) Gibraltar Savings for the payment of interest and principal on its outstanding public debt securities; and the undisclosed regulatory agreement between GFC and the FHLB virtually assured GFC's default on its obligations to public bondholders if Gibraltar Savings' financial condition deteriorated and GFC was forced to infuse Gibraltar Savings with additional capital pursuant to the regulatory agreement. None of the foregoing facts were disclosed by Gibraltar or otherwise discovered and known during the course of, and at the time of the settlement of, the *In re Gibraltar* class action

litigation. In respect of such settlement, and in defense of this action and in all related litigation, the defendants denied any wrongdoing including in respect of the real estate losses, mortgage-backed securities losses and/or the imposition of a Government conservatorship over Gibraltar Savings and ultimate liquidation of both Gibraltar Savings and GFC.

The notice of proposed settlement in the *In re Gibraltar* case, prepared by the parties' and their attorneys, approved by the Court as submitted and sent to all members of the proposed settlement class pursuant to FRCP Rule 23 for purposes of the hearing on the parties' stipulation/motion to approve the settlement (and possible objections and/or opt-outs therefrom), stated that such settlement, for $8.5 million, would consume substantially all of Gibraltar's available O/D's liability insurance. The settlement notice did not say anything about the cancellation of up to $40 million of insurance otherwise available to pay claims of the class in respect of their ownership of Gibraltar stock and/or in respect of Gibraltar bonds owned by such class members and other Gibraltar investors.

At the hearing on the proposed settlement of existing stockholder claims, the FDIC sought to file an objection to the settlement on the basis that such agency, which was administering the Gibraltar Savings receivership on behalf of the FHLB prior to the inception of the RTC, had learned that the proposed settlement, and funding thereof by Gibraltar's insurance carrier, was conditioned upon cancellation by Gibraltar and the insured O/D defendants of a policy maintained by Gibraltar and otherwise available to satisfy claims by Gibraltar stock and bondholders. Neither the availability of insurance substantially in excess of $8.5 million, nor the plan to cancel insurance otherwise available to pay stock and bondholder claims, was reported in or otherwise disclosed to the District Court in the parties' joint

stipulation and motion for approval of settlement or in the notice prepared by the parties, approved by the court and mailed to all members of the class sometime after the July 11, 1989 date thereof. At the hearing on approval, the District Court ruled that the FDIC did not have standing to object to the proposed settlement and would not be allowed to make the proposed objection and that, in any event, the FDIC's proposed submission to the court was not timely. No class members were in attendance at the hearing. Notwithstanding the obvious deficiency in the Rule 23 notice mailed to the class for purposes of the settlement hearing (and decisions by class members to opt-out of the class or otherwise take action to protect their own individual interests), the court ruled that (1) the notice previously mailed to the class was sufficient to satisfy Rule 23's requirements and (2) the settlement was fair, reasonable and adequate. The court approved the settlement knowing that it involved the cancellation of insurance in the approximate amount of $40 million otherwise available to the class and opt-outs in respect of both their stock (which were covered by the settlement) and bond claims. The stockholder settlement, and *In re Gibraltar* case, was finally concluded on September 19, 1989.

Named plaintiffs John and Patricia Glavaris purchased Gibraltar stock and bonds at various times throughout the class period (January 1, 1986 through April 30, 1989). (To no avail, the Glavaris also tried to improve their position as creditors in the GFC bankruptcy proceeding in June of 1989 by selling one class of bonds and purchasing a more senior issuance of Gibraltar bonds). Benny Tolley purchased Gibraltar bonds during the class period. Glavaris opted-out of the *In re Gibraltar* stockholder settlement (which did not cover bondholder claims). Glavaris and Tolley filed the instant class action for themselves and on behalf of bondholders and stockholders including on behalf

of Gibraltar stockholders against those defendants in the *In re Gibraltar* action who were named but did not participate in the settlement of such action or who were not previously named as defendants in such action. (A draft of the *Glavaris* complaint had been provided to the defendants' counsel in the Summer-Fall of 1989, but such counsel had requested that the plaintiffs refrain from filing the complaint because the defendants were attempting to negotiate a "global" settlement, which would include all stock and bondholder claims, with Gibraltar's insurance carrier to be implemented in the *In re Gibraltar* action). Petitioner Joel Binder purchased Gibraltar bonds during the class period. Petitioners Bernard and Merit Fidel were Gibraltar stockholders and bondholders who participated in the settlement of their stock claims in the *In re Gibraltar* action. Both Binder and the Fidels sought (but were denied) leave to intervene as name plaintiffs and class representatives at the outset of the instant action. The defendants moved under FRCP Rule 12(b)(6) to dismiss the complaint in this (the "*Glavaris*") action. For purposes of such motions, the court re-defined the class into three separate periods[2/], and ruled

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[2/] **Period 1**: January 1, 1986 through November 3, 1987 (Gibraltar's October 30th release was publicly reported in the press); **Period 2**: November 4, 1987 through April 3, 1989 (Government conservatorship of Gibraltar publicly reported); and **Period 3**: April 4, 1989 through November 16, 1990 (date of filing the instant action). In attempting to justify re-defining the class into three separate class, the court may have confused the legal viability of such claims (on a stand alone basis and as extending from one period to another) with the need to establish damages associated with claims existing at various times throughout the class period stated in the complaint. The difficulty in establishing damages should not, however, be allowed to defeat the existence of the claims of the plaintiffs and the class in the context of a 12(b)(6) motion. The October 30th announcement did not disclose any basis for believing the losses reported therein were the result of fraud by any of the defendants - - especially Gibraltar's outside professionals. In fact on August 12, 1988 and again in April of 1989, Gibraltar and its

that the plaintiffs and the class' claims could only exist within the boundaries of each of the three separate periods as defined by the court. The court ruled that the plaintiffs' Rule 10b-5 claims in period 1 were precluded as a matter of law as a result of the October 30th loss announcement and the resulting preclusion of such claims based on constructive or inquiry notice and application of the three year statute of limitations period, that the named plaintiffs had not purchased any Gibraltar stock in period 2 (which the court later acknowledged in MOD#2 was not the case but refused to re-instate the plaintiffs and the class' period 2 claims[3/])

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attorneys, who gave interviews to the press, reported that a special independent investigation conducted in respect of such losses had concluded that there was no actionable conduct by Gibraltar's management. The April 3, 1989 announcement reported the imposition of the Government conservatorship, and did not report any wrongdoing by Gibraltar's management. Gibraltar's management, thereafter, mailed a letter to all of Gibraltar's securities holders denying that there was any basis for the imposition of such conservatorship, and vowing to challenge the conservatorship as unlawful. The court rejected plaintiffs' allegations that the defendants' fraud, relating to the nature, reasons and timing of Gibraltar's real estate losses and the existence of losses attributable to Gibraltar's fixed rate mortgage-backed securities and resulting "unsafe and unsound" financial condition, permeated the entire class period as stated in the complaint, including the time frame the court defined as class periods 1 and 2.

[3/] When the court realized that John Glavaris had completed the purchase of Gibraltar securities on November 4, 1987, and was thus a "purchaser" in the court's period 2 class period, the court was still unwilling to acknowledge Glavaris' claim and standing to represent the stock and bondholder claimants for Rule 12(b)(6) purposes stating that it was the court's belief that Glavaris could not possibly have been relying upon any material misrepresentation (or omission) in deciding to purchase Gibraltar securities on that date and that he must, therefore, have been speculating that Gibraltar's securities would go back up following the loss announcement which the court found to have been

and, therefore, such plaintiffs lacked "standing" to assert any individual claims (federal or state and/or act as class representatives for such period 2 claims, and because the basis for the claims in the court's period 3 time frame was the same as for period 2 and the April 3rd conservatorship announcement precluded investor reliance on any wrongdoing in period 2 serving as the basis for any period 3 claims (notwithstanding the Gibraltar defendants' public denial of wrongdoing in any of such periods).[4/] Furthermore, the court reconsidered and confirmed its prior decision that no class members including Binder and the Fidels would be allowed to intervene to represent the interests of the class in any period in respect of which the named plaintiffs had not purchased any Gibraltar securities (because, due to the named plaintiffs' lack of standing in period 2, there was no class action in which to intervene). The court did, however, permit John Glavaris' individual Rule 10b-5 stockholder, and several related state law, claims to proceed against defendant Young.[5/] All of the class

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disseminated into the market by November 3rd (but never inquired as to if and when John Glavaris actually learned about the loss announcement - - which was sometime after November 4th - - for purposes of his individual reliance claim under Rule 10b-5).

[4/] The court dismissed all of the plaintiffs' claims under Rule 12(b)(6), except as to the statute of limitations ground for such dismissal (period 1 claims), based on Gibraltar's October 30th press release, in respect of which the court treated the defendants' motions to dismiss as motions for summary judgment under FRCP Rule 56.

[5/] Order dated August 10, 1994 ("John Glavaris' individual claim against Young for violation of Section 10(b) and Rule 10b-5, breach of fiduciary duty based on a fraud theory, fraud and deceit, and negligent misrepresentation" would proceed following

periods as defined by the court, and the class period actually stated in the complaint, are co-extensive with the period of time in respect of which the defendants publicly denied any wrongdoing including based on the special investigation which was conducted and was reported to have exonerated Gibraltar's management from responsibility for any wrongdoing - - which claims the court ruled the plaintiffs and the class should have nevertheless been able to discern and initiate, notwithstanding the published results of the special investigation, on or prior to November 2, 1990 when the statute of limitations on such parties' "period 1" claims ran out (November 3, 1987 through November 2, 1990) based on the court's constructive notice analysis and ruling.[6/] The complaint in this action was filed November

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issuance of MOD#2 and lifting of stay). On November 13, 1995, plaintiff John Glavaris entered into settlement agreement, subject to court approval, disposing of his then remaining individual Rule 10b-5 and state claims against defendant Young and his remaining individual proxy claims against both defendant Young and the remaining individual O/D defendants. The settlement agreement between plaintiff Glavaris and the settling O/D defendants covered only such plaintiff's few remaining claims in this action (individual Rule 10b-5 and pendant state claims against Young and an individual proxy claims against al of the director defendants); and such agreement, by its terms, expressly reserved to Glavaris and to and for the benefit of the class, the instant appeal of the dismissal of all claims in this action previously dismissed by the court. The settling parties filed a motion for determination of good faith settlement; and on February 7, 1996, the court approved the parties' motion for good faith settlement determination, and dismissed plaintiff John Glavaris' remaining claims as described above, and issued judgment thereon.

[6/] Gibraltar's October 30th press release was not mailed or otherwise furnished to Gibraltar's securities holders. The release

16, 1990 (which was within the three year period following

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was the subject of several articles published in the financial press including the *Los Angeles Times* and the *Wall Street Journal*, which reported favorably on Gibraltar's decision to get out of the commercial real estate business and concentrate on its traditional S&L business. Such articles appeared on or about November 3, 1987. The *WSJ* reported that Gibraltar "stretched themselves too thin by making a lot of real estate loans out of state, out of their area of expertise . . . They will have to hunker down for a while and stick to their basic business". The *Los Angeles Times* article quoted Robert Morris, Assistant Commissioner for the California Department of Savings and Loan, stating that Gibraltar was "an old established company. They took a hit, but we don't see any reason for concern", and quoted Herbert J. Young, who told the Times reporter - - "Believe it or not, this company is much stronger after doing this . . . This is not going to happen again." The release, and the articles reporting on such announcement, did not put readers on notice of possible fraud. The announcement of large losses does not, by itself, implicate fraud by the reporting company's management (and certainly not by its outside professionals). The release was designed to and did cover-up and conceal the prior existence of losses from Gibraltar's real estate operations during 1985-1986 when Gibraltar had been reporting "record earnings". The market price of Gibraltar's stock actually edged up slightly in the several weeks following the October 30th announcement. (The price of Gibraltar stock certainly did not "plummet" as referenced by the court in its MOD#1. (Appendix F). The court's constructive notice theory for dismissing the plaintiffs and the class' "period 1" claims is based on the proposition that Gibraltar's public investors should have been able to find what the financial press, and the special investigation committee and its professional advisors, did not find. None of Gibraltar's published financial statements, issued after the October 30th announcement, reflected or otherwise reported any liability or contingent liability associated with any wrongdoing by Gibraltar's management in respect of the subject matter of the October 30, 1987 announcement or otherwise.

the filing of the *Weinberger* stockholder derivative action on November 17, 1987 alleging breach of fiduciary duty and breach of contract).[7/]

REASONS FOR GRANTING THE PETITION

The questions presented by this petition represent important questions of federal law which have not been but should be settled by this Court, including decisions by the Ninth Circuit which are in conflict with the decisions of one or more circuits, and also involve decisions by the Ninth Circuit and the lower court which are in direct conflict with the relevant decisions of this Court including in respect of FRCP Rules 23 and 24 and the Court's *General Tel. Co. v. Falcon* and *American Pipe* line of cases.

The questions presented are important and compelling in the sense that they affect the substantial number of Rule 10b-5 class action cases processed by the courts each year and the efficient system-wide administration of such cases.

[7/] This action was filed on November 16, 1990. The first Rule 10b-5 action (*Model* consolidated into *In re Gibraltar*), was filed November 23, 1987. All of the Gibraltar management defendants, except Young, and accounting defendants named therein were dismissed out of the *In re Gibraltar* case on or after June 20, 1988. The settlement in *re Gibraltar* was finalized (and the non-settling defendants were dismissed), and the case was dismissed, on September 19, 1989. John Glavaris filed a notice of exclusion from the class action settlement in *In re Gibraltar* on July 28, 1989. The "worst case" analysis which plaintiffs could conceivable face would be for the statute of limitations to begin running on October 30, 1987, toll the running of the statute from November 23, 1987 through June 20, 1988, and commence the re-running of the statute from June 21, 1988 through November 16, 1990 when this action was filed - - a total of less than three years.

The question presented concerning the application of theories of fraudulent concealment, equitable tolling and equitable estoppel to the statute of limitations for Rule 10b-5 cases is very important particularly in the facts and circumstances of this case where the court adopted constructive notice as the basis to commence the running of the statute of limitations but declined to toll the running of such statute, or otherwise deny the defendants the benefit of such statute, where the defendants sought to mislead investors into believing they had no claims through the use of the purported special investigation and determination by such "independent" committee that there was no factual basis for the assertion of any claims by Gibraltar investors against Gibraltar's management (or presumably the members of the investigating committee and their professional advisors).

This case is also important in that it involves the application of Rule 10b-5 to accounting, attorney and financial public relations professionals who participated directly in the development, implementation and concealment of the underlying fraud. Accountants devised methods to perpetrate an accounting fraud involving, among other things, the transfer of the Galleria off Gibraltar's balance sheet to avoid audit. Financial public relations advisors wrote releases, president's letters and speeches for public dissemination to Gibraltar investors which they knew were not true. Attorneys knew about and participated in the fraud being perpetrated on the investing public, and made public announcements designed to cover-up and conceal such fraud and to mislead investors as to the existence of claims against such defendants. See the Second Amended Complaint, at Appendix E hereto.

For the reasons set forth herein, the Court is respectfully requested to grant this petition and decide the within important federal questions.

Rules 23 and 24

The decision of the court, which was affirmed by the Ninth Circuit, severely undermines Rules 23 and 24 of the Federal Rules of Civil Procedure ("FRCP") and is contrary to the decisions of this Court interpreting such Rules and the important class action procedure provided for therein.

In the past, this Court has reviewed and offered guidance in respect of the decisions of the courts of appeal interpreting and applying Rules 23 and 24 in a manner which this Court believed did not fulfill the intended purpose and objectives of such Rules. *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974); *Crown Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983); *United Airlines Inc. v. McDonald*, 432 U.S. 385 (1976), *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 (1982); *Chardon v. Fumero Soto*, 462 U.S. 650 (1983); *Pavlak v. Church*, 681 F.2d 617 (9th Cir. 1982), *vacated and remanded* in light of *Crown Cork*, 103 S.Ct. 352 (1983) ("American Pipe cases").

Binder And The Fidels' Motion To Intervene Was Entirely Consistent With And Appropriate Under FRCP Rules 23 And 24 And This Court's *American Pipe* Cases

In accordance with this Court's *American Pipe* line of decisions interpreting FRCP Rules 23 and 24, the court should have permitted amendment of the complaint in this case so as to allow one or more additional plaintiffs and proposed class representatives to intervene in the instant action (including after the court had announced its decision to redefine the class set forth in the complaint in a manner which jeopardized the continued maintenance of the case as a Rule 23 class action relating to the adequacy of the claim

and/or representation of the named plaintiffs).[8/]

Intervention in the context of a FRCP Rule 23 class action is governed by both Rule 23 and 24.[9/] The Advisory Committee Notes to Rule 23, in respect of the 1996 Amendment, provide, as follows:

> "A class member who claims that his 'representative' does not adequately represent him, and is able to establish the proposition with sufficient probability, should not be put to the risk of having judgement entered in the action which by its terms extends to him, and be obliged to test the validity of the judgement as applied to his interest by a later

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[8/] *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 559 (1974) (commencement of the class action suit fulfills the policies of repose and certainty inherent in the limitations provisions and tolls the running of the period otherwise provided by the statute); and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353 (1983) (Rule 23 tolling applies to all members of the putative class; the filing of the complaint notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment; the defendants will be aware of the need to preserve evidence and witnesses respecting the claims of all members of the class; tolling the statute of limitations thus creates no potential for unfair surprise, regardless of the method class members choose to enforce their rights if the class is not ultimately certified).

[9/] See, for example, FRCP Rule 23(c)(2)(C) providing for notice to absent class members so that they may enter an "appearance" through their own counsel.

collateral attack. Rather he should, as a general rule be entitled to intervene in the action".

The motion by Binder and the Fidels to intervene in *Glavaris* appears to fall squarely within the guidelines set forth in such Notes in favor of intervention by putative class members who have some concern about the adequacy of representation that will be provided by the named class representative. In the instant case, on August 30, 1991, the plaintiffs-in-intervention, before any answer had been filed, before any discovery had been conducted and during the time period when the court had issued an order staying the proceedings in this case pending the court's decision in respect of all of the defendants' motions to dismiss, filed a motion to intervene as plaintiffs and class representatives on behalf of the putative class claimants. The court denied the motion without explanation (other than the court's brief statement at the hearing on such motion to the effect that it was "too late" to allow any new plaintiffs to come into the case).[10/] The plaintiffs-in-intervention, as it subsequently turned out based on the court's memorandum of decision dated September 8, 1992 ("MOD#1"), purchased Gibraltar bonds in the time frame the court subsequently defined as period 2 (November 4, 1987 through April 3, 1989). Following issuance of the court's MOD#1, re-defining the class and dismissing the plaintiffs and the class' period 2 bondholder claims for lack of a plaintiff who purchased any

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[10/] The court's minute order dated October 7, 1991 reads, as follows: "Court denies motion to intervene as party plaintiffs". The court's MOD #2 was issued August 10, 1994. The only answer to the complaint, by defendant Young to John Glavaris' individual Rule 10b-5 and related state law claims, was filed on February 23, 1995 (while the proposed settlement of the remaining claims by John Glavaris against defendant Young was pending before the court).

Gibraltar bonds in such newly created class period, Binder and the Fidels tried to revive their motion to intervene, seeking to represent the class of bondholders who had purchased Gibraltar's bonds in the period which the court defined as "period 2", but the court refused to allow such intervention indicating that the court had already reconsidered and confirmed its prior ruling denying such plaintiffs-in-intervention (or, presumably, any member of the class) the right to intervene as named plaintiffs in the *Glavaris* action in order to save and protect the bondholder class' claims.[11/] Such "second" ruling came at a time when the court's stay of the proceedings in *Glavaris* was still in effect, no answers had been filed and no discovery had been conducted. The plaintiffs-in-intervention sought to come into *Glavaris* to protect their own and the class' interests in respect of claims which were the same or similar to such class members' claims. Immediately after the issuance of the court's MOD#1 (no intervention by such plaintiffs allowed), on September 22, 1992 Binder and the Fidels filed their own separate bondholder class action (USDC Case No. CV-92-5715-MRP), and the same court refused to apply Rule 23 tolling or Section 27A of the Securities Exchange Act of 1934 (*Lampf* "savings" legislation[12/]), and dismissed such action in its entirety based on statute of limitations grounds which the court determined to have expired between the time Binder/Fidel sought to intervene in *Glavaris* and the filing of their separate action.

[11/] The court's last order on the subject, dated June 21, 1995, in *Glavaris* reads: "As the Minutes for October 7, 1991 reflect, the Court denied the motion to intervene in open court and reconsidered and reaffirmed its ruling in its Second Memorandum at page 34".

[12/] *Lampf, Pleva, Lipkind, Prupis & Pettigrow v. Gilbertson*, 501 U.S. 350, *reh'g denied*, (1991).

The court's decisions in respect of the Binder and the Fidels' motion to intervene in the instant action, affirmed by the Ninth Circuit, are inconsistent with FRCP Rules 23 and 24(a) and this Court's *American Pipe* line of cases. It is, therefore, appropriate and necessary that the Court grant the instant petition and again address and issue guidance in respect of the relationship and application of Rules 23 and 24 to class action litigation throughout the federal system.

In *American Pipe, supra,* this Court reversed a district court's refusal to allow a member of the putative class to intervene in such suit following the court's refusal to certify such suit as a class action under FRCP Rule 23. This Court's *American Pipe* line of decisions, including *Crown Cork* and *United Airlines, supra,* enunciate as governing principles under FRCP Rules 23 and 24 that putative class members may properly seek to and should be allowed to intervene in Rule 23 actions both before and after the court has made a determination as to the class action status of any such suit under Rule 23, provided that such intervenor's claims include common issues of fact and law which predominate over the other issues attending such respective cases; and that, pending such determination of class action status, the statute of limitations is tolled as to the claims of all putative class members, whether they seek to intervene or not, whose claims would be covered by the putative class allegations as set forth in the complaint if such action is allowed to proceed as a class action under Rule 23. Binder and the Fidels' right to intervene in this action is consistent and appropriate with this Court's *American Pipe* reasoning and line of decisions.

The settlement of *In re Gibraltar*, prior to any determination as to the class action status of such case(s) under Rule 23 (other than the stipulated settlement class), not only did not preclude the subsequent filing of the within

Glavaris action covering stock and bondholder claims which were not part of such settlement (and the application of Rule 23 tolling covering such unresolved class claims), but the filing of such subsequent class action was entirely consistent with the purposes and objectives of Rule 23 and this Court's long-standing decisions in respect of such matters.

The court's refusal to allow Binder and the Fidels to intervene in the *Glavaris* action as representatives for bondholder "period 2" claims (and stockholder claims against non-settling defendants) also implicates and is inconsistent with this Court's decision in *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 156 (1982) (the purported class representative need only be part of the class and possess "the same interest and suffer the same injury as the class members"). The incurrence and fraudulent concealment of substantial losses, attributable to Gibraltar's commercial real estate and bond portfolios and threatening Gibraltar's financial condition, regulatory standing and continued viability, extended throughout the class period as defined in the complaint and resulted in a common injury (the loss of savings invested in Gibraltar securities) from a common cause (false and misleading securities disclosures by corporate mangers and professionals which were hidden from investors for the approximately two and one-half year period covered by this action and thereafter).

In accordance with Rule 23 and this Court's decision in *Falcon*, the named plaintiffs including John Glavaris should have been permitted to assert their individual claims, and to act as class representatives, in each of the three time periods defined by the court for purposes of determining the defendants' Rule 12 (b)(6) motions. The plaintiffs and the class' claims arose out of the same securities disclosure documents and omissions therefrom and the same fraudulent course of conduct and actions by the defendants; and such

facts were related and on-going throughout the entire class period and, therefore, involved common issues of fact and law.[13/]

Further, the court should have ruled on the defendants Rule 12 motions based on the allegations set forth in the complaint (including the definition of the Rule 23 class period) and deferred until the motion for class certification any determination as to whether or not such allegations satisfied Rule 23's requirements, and the advisability of creating any sub-classes to enhance the administration of the class action which the court was willing to certify as complying with Rule 23.

The Court Should Not Have Foreclosed Application Of Principles Of Fraudulent Concealment, Equitable Tolling Or Equitable Estoppel To Deny The Defendants The Benefit Of The Statute Of Limitations Given The Defendants' Public Representations As To The Absence Of Actionable Conduct By Such Defendants

Following the October 30th loss announcement, and the filing of the *Weinberger* shareholder derivative action for breach of fiduciary duty, and the initial *Model* Rule 10b-5 action (consolidated into *In re Gibraltar*) filed on

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[13/] The false and misleading nature of the October 30th release and the resulting press reports thereon disseminated on or about November 3, 1987 (failure to disclose the actual nature, reasons and timing of previously existing and unreported real estate losses and the existence of substantial losses attributable to Gibraltar's bond portfolio threatening Gibraltar's regulatory good standing, financial condition and ability to continue as a going concern) inextricably linked the fraud in the time frames the court described as periods 1 and 2.

November 23, 1987, Gibraltar announced that a special investigation committee, composed of the "outside" members of Gibraltar's Board of Directors and aided by Gibraltar's outside general counsel and an independent accounting firm, had been constituted to investigate the facts and circumstances surrounding the losses which were the subject of such loss announcement. On August 12, 1988, in connection with the settlement of the *Weinberger* action (without the payment of any compensation by any defendant to Gibraltar), Gibraltar and its attorneys publicly reported that the special investigation committee could find no evidence of any actionable conduct by Gibraltar's management.[14/] Thereafter, Gibraltar's outside accountants, attorneys and financial public relations firm continued to represent Gibraltar, including in respect of securities registration and disclosure matters and, in the case of such attorneys, litigation where such counsel represented both Gibraltar and its management.

[14/] To the contrary, the members of the special investigation committee and counsel knew about the FHLB's "unsafe and unsound" report and the unreported loss of $500 million attributable to Gibraltar's portfolio of unhedged fixed rate mortgage-backed securities, the absence of appraisals which Gibraltar had been representing were used to value Gibraltar's real estate development properties, the cancellation of the appraisal on the Galleria and the unreported loss represented thereby, the secret issuance of two different sets of audited financial statements for the period ended December 31, 1996, the temporary transfer of the Galleria off of Gibraltar's balance sheet at December 31, 1996, and the existence of the capital maintenance agreement whereby GFC had obligated itself to maintain Gibraltar Savings' capital at regulatory minimums; and they, therefore, knew such matters, and the concealment thereof, represented actionable conduct by Gibraltar's management, themselves and Gibraltar's outside professionals.

In refusing to apply recognized principles of fraudulent concealment, equitable tolling and/or equitable tolling to the plaintiff's Rule 10b-5 (and related state law claims), to deny the defendants the benefit of any "constructive notice" statute of limitations defense, the court in effect determined that Gibraltar's public investors were capable of conducting their own investigation and of actually uncovering the actionable conduct by the defendants which the Gibraltar special investigation committee, aided by Gibraltar's long-time general counsel and an independent accounting firm, reported they could not find and that no member of the financial press was able to discern.[15/]

Application of Rule 10b-5 in an environment of fraudulent concealment by corporate defendants against such corporation's public investors, whether viewed in a pre or post-*Lampf* setting, should not result in the summary

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[15/] Even if an investor had suspected something more than was reported by Gibraltar and the press regarding Gibraltar's real estate loss announcement, and had considered inquiring into possible wrongdoing pertaining to such matter, it would have been virtually impossible for any such person - - given the resources and access customarily available to the average public investor - - to even begin to discover the wrongdoing which the defendants had been and continued to systematically cover-up and conceal. It is also reasonable to assume that, when the result of the "special investigation" purportedly conducted by Gibraltar and its attorneys was announced (no finding of any actionable conduct by Gibraltar's management), whatever suspicions might otherwise have existed regarding the October 30th loss announcement would have been completely dispelled by such "clean bill of health". (There were no reports of any Government investigations, or even any inquiries, including by the SEC, FHLB, FDIC, FSLIC and/or the California Department of Savings and Loan regarding Gibraltar including the losses which were the subject of the October 30th release).

dismissal of claims by such public investors against such alleged wrongdoers.

Application of fraudulent concealment, equitable tolling and/or equitable estoppel in the instant *In re Gibraltar Glavaris* case, in light of the preceding class action litigation against defendants named therein (and, possibly, their counsel), would be entirely consistent with this Court's prior Rule 23 tolling decisions. As the Court indicated in *American Pipe* (414 U.S. at 559), commencement of the class action suit (*In re Gibraltar*) fulfills the policies of repose and certainty inherent in the limitations provisions (including Section 9(e) of the Securities Exchange Act) and tolls the running of the period otherwise provided by the statute.

A Difference Of Opinion Exists Between The Circuit Courts As To The Interferences To Be Drawn From The Pleading And Proof Of A Pattern Of Racketeering Activity To Establish For Pleading Purposes The Existence Of A RICO Enterprise

The court dismissed plaintiffs' RICO claim against all defendants, without leave to amend, based on the grounds that the complaint failed to adequately plead a RICO "enterprise"[16/], and rejecting the proposition that such

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[16/]Prior to the affirmation of the lower court's decision on the issue of the plaintiffs' having adequately pled a RICO "enterprise", which the appellants described in their briefs to the Ninth Circuit as a "key" issue to be decided in the appeal, the Ninth Circuit had not previously had the occasion to address such issue. See *United Energy Owners v. United Energy Management*, 837 F.2d 356, 363 (9th Cir. 1988). It is fairly understood from the Ninth Circuit's disposition of the appeal (affirmance in respect

enterprise can be inferred from the allegations pled to establish a "pattern of racketeering activity".[17/] Although the Ninth Circuit rejected the plaintiffs' argument on appeal, and affirmed and adopted the lower court's dismissal of the plaintiffs' RICO claim as a result of the complaint's failure to plead a RICO "enterprise", the Third Circuit has adopted a

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of such key question, and the language to the effect that such appellate court was adopting "the thorough and well reasoned" decision of the District Court as its own in respect of this "no enterprise" issue) and that such decision is in conflict with the determination of the Third Circuit which was cited to the Ninth Circuit as the basis for reversal of the District Court's decision on this point.

[17/]MOD#1, 52d ("Plaintiffs allege the conclusion that the defendants constituted an association in fact and an enterprise which operated separately and distinctly from Gibraltar but failed to allege any facts which would permit an inference that this group actually did operate separately and distinctly from GFC or Gibraltar Savings"). Plaintiffs respectfully disagree; and submit that what the court actually did was to refuse to provide the plaintiffs with the benefit of favorable inferences which could and should have been drawn from the substantial facts pleaded in respect of the RICO defendants' enterprise and racketeering activities. The court also concluded that the complaint having failed to allege any mail or wire fraud claims, or any federal securities law claims against any of the defendants (the one exception being John Glavaris' individual Rule 10b-5 claims against defendant Young, which securities claim was not referenced in the RICO section of the court's MOD #1), complaint could not, therefore, state a pattern of racketeering based on such dismissed securities claims. The court further indicated that, in any event, plaintiffs' securities claims allegations, based on Rule 10b-5's customary "in connection with the sale of securities" standing allegations, were legally deficient to satisfy RICO's "fraud in the sale of securities" racketeering activity definition. MOD#1; RICO §1961(1).

contrary position in holding that the enterprise can be inferred from proof of the pattern of RICO activities alleged in the complaint. *U.S. v. Pelullo*, 964 F.2d 193, 212 (3rd Cir. 1992).

In *Pelullo*, the Third Circuit observed that there are not necessarily two separate tests for lawful and unlawful enterprise activity; that the requisite *elements* of enterprise and pattern do not differ in these settings, rather it is the *proof* necessary to establish these elements that may or may not differ. In *Turkette*, this Court indicated that an enterprise is an "entity separate and apart from the pattern of activity in which it engages", but also stated that the elements of proof of the enterprise and the pattern may coalesce in particular cases. *U.S. v. Turkette*, 452 U.S. 576 (1981)(proof of the existence of an enterprise is made "by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit"). In cases where the enterprise is alleged to be an association-in-fact of individuals, it is likely that the elements of proof establishing the enterprise and the racketeering activity can be the same.

It is submitted that in the instant association-in-fact "enterprise" case, the same allegations (and the favorable inferences to be drawn therefrom) can and do satisfy plaintiffs' pleading burden as to both the "enterprise" and the "racketeering activity" elements of the plaintiffs' RICO claim as pled in the complaint.

Claims Against Certain Professionals

Accounting defendant Kenneth Leventhal & Co acted as outside independent accountants for Gibraltar's real estate partnerships and their reports on such partnerships' financial statements were relied upon by Gibraltar's auditors of record

(Ernst & Whinney and Peat Marwick) whose opinions appeared in Gibraltar's published securities registration and disclosure documents. The complaint alleges that Leventhal was the principal architect of the Gibraltar "accounting fraud". The court dismissed Leventhal on the grounds that none of the published statements alleged to be false and misleading were publicly attributed to Leventhal (no Leventhal audit report accompanied Gibraltar's published financial statements), and the court rejected plaintiffs' argument that Leventhal's ("nonverbal") conduct was actionable under Rule 10b-5(a) and (c). Similarly, the court ruled that attorney defendant Gibson, Dunn & Crutcher, general counsel to Gibraltar responsible for drafting disclosure items alleged to be false and misleading, was under no obligation to disclose any information to investors; and the court rejected plaintiffs' arguments to the contrary, including that Gibson's role as "press secretary" for Gibraltar and the special investigation committee (and service as counsel for such committee) obligated such defendant to make affirmative disclosure of information necessary to correct false and misleading information and to refrain from making false or misleading statements to investors. The court also dismissed defendant Rifkind, Pondell & Parson (financial public relations firm) on the grounds that none of the alleged false or misleading statements were publicly attributed to Rifkind and that such defendant was not otherwise liable for fraudulent (non-verbal) conduct under Rule 10b-5. The court's decisions were inconsistent with Rule 10b-5 and this Court's decisions in *Affiliated Ute Citizens v. Utah*, 406 U.S. 128 (1972), and *Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164 (1994).

CONCLUSION

The perpetration of the "special investigation" fraud and concealment (like the defendants' false protestation that

there was no basis for the Government seizure of Gibraltar Savings in April of 1989) should have been sufficient to sustain, or at least preserve for the trier of fact, the plaintiffs' fraudulent concealment and other equitable allegations intended to deny the defendants the benefit of any "limitations of actions" defense which might otherwise be invoked by such defendants in an effort to escape accountability for their wrongdoing. Investor rights, and the purposes of the federal securities laws, are being seriously undermined by the lack of judicial articulation in respect of the application of a constructive notice rationale to summarily cut-off public investor claims against public corporation defendants in Rule 10b-5 securities cases. It is submitted that active concealment of operative facts indicative of wrongdoing by defendants should automatically foreclose the use of the statute of limitations defense by defendants engaged in such fraudulent concealment. This Court is requested to utilize this case to establish that the presence of a "special investigation" by corporate wrongdoers to cover-up and conceal their own actionable conduct, from the people whom they are duty bound to inform and protect, is not protected activity under Rule 10b-5 (including under this Court's decision in *Lampf)*. The court's unwillingness to allow members of the class to intervene in *Glavaris*, the court's failure to apply Rule 23 tolling to preserve the claims of the *Glavaris* plaintiffs and the class and the court's disassembly and reconstruction of the class period pled in the complaint for purposes of its ruling on the defendants' Rue 12(b)(6) motions, were individually and collectively in contravention of this Court's *American Pipe* line of decisions in furtherance of the purposes, objectives and application of Rule 23 to securities class action litigation. The Court is respectfully requested to grant this petition.

Dated: August 29, 1998

Respectfully submitted,

ROBERT H. BRETZ, P.C.

By: s/ Robert H. Bretz
Attorney for Petitioners

(2) 98 389 AUG 31 1998

No.

Supreme Court of the United States

October Term, 1998

JOHN GLAVARIS AND PATRICIA GLAVARIS; BENNY L. TOLLEY; JOEL BINDER; MARIT FIDEL; BERNARD FIDEL,
Petitioners,
vs.
HERBERT J. YOUNG; JAMES N. THAYER; JAY JANIS; JOHN R. WILLIAMSON; MICHAEL W. MOONEY; LYNNE CRAWFORD; LINDA K. S. BLOUNT; ROBERT R. SPRAGUE; HOUSTON I. FLOURNOY; BERNICE HUTTER; MELVIN P. SPITZ; RAFAEL E. VEGA; GIBRALTAR SAVINGS; GIBRALTAR, F.A.; MELVIN RIFKIND; GIBSON DUNN & CRUTCHER; KPMG PEAT MARWICK; ALVIN KANG; ERNST & WHINNEY; ERNST & YOUNG; WILLIAM H. DUDLEY; MELVIN RIFKIND; RIFKIND, PONDEL & PARSON; KENNETH LEVENTHAL & COMPANY; RICHARD SPRAYREGEN; FEDERAL DEPOSIT INSURANCE COMPANY, as Receiver for Gibraltar Savings, F.A.
Respondents.

Petition For Writ Of Certiorari

APPENDIX

Volume I

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MYRON R. STAHL,
Plaintiff-Appellant,

v.

GIBRALTAR FINANCIAL CORPORATION,
Defendant-Appellee.

CASE NO. 96-55201
D.C. NO. CV-87-03147-MRP

JOHN GLAVARIS AND PATRICIA GLAVARIS;
BENNY L. TOLLEY,
Plaintiffs,

and

MYRON R. STAHL,
Plaintiff-Intervenor-Appellant,

v.

HERBERT J. YOUNG; JAMES N. THAYER; JAY JANIS, JOHN R. WILLIAMSON; JEROME NUSSBAUM; MICHAEL W. MOONEY; LYNNE CRAWFORD; LINDA K. S. BLOUNT; ROBERT R. SPRAGUE; HOUSTON I. FLOURNOY; BERNICE H. HUTTER; MELVIN P. SPITZ; RAFAEL E. VEGA; GIBRALTAR SAVINGS, F.A.; MELVIN RIFKIND; GIBSON DUNN & CRUTCHER; ERNST & WHINNEY; ERNST & YOUNG; WILLIAM H. DUDLEY; RESOLUTION TRUST CORPORATION, as Receiver for Gibraltar Savings; MELVIN RIFKIND; RIFKIND, PONDEL & PARSON; KENNETH LEVENTHAL; RICHARD SPRAYREGEN; JEROME NUSSBAUM,
Defendants- Appellees

CASE NO. 96-55230
D.C. NO. CV-90-06185-MRP

JOHN GLAVARIS AND PATRICIA GLAVARIS;
BENNY L. TOLLEY,
Plaintiffs - Appellants

v.

HERBERT J. YOUNG; JAMES N. THAYER, JAY JANIS; JOHN R. WILLIAMSON; JEROME NUSSBAUM; MICHAEL W. MOONEY; LYNNE CRAWFORD; LINDA K. S. BLOUNT; ROBERT R. SPRAGUE; HOUSTON I. FLOURNOY; BERNICE H. HUTTER; MELVIN P. SPITZ; RAFAEL E. VEGA; GIBRALTAR SAVINGS; GIBRALTAR, F.A.; MELVIN RIFKIND; GIBSON DUNN & CRUTCHER; KPMG PEAT MARWICK; ERNST & WHINNEY; ERNST & YOUNG; WILLIAM H. DUDLEY; FEDERAL DEPOSIT INSURANCE COMPANY, as Receiver as Receiver for Gibraltar Savings, F.A.; MELVIN RIFKIND; RIFKIND, PONDEL & PARSON; KENNETH LEVENTHAL; RICHARD SPRAYREGEN; JEROME NUSSBAUM,
Defendants-Appellees.

CASE NO. 96-5544
D.C. NO. CV-90-06185-MRP

JOHN GLAVARIS AND PATRICIA GLAVARIS;
BENNY L. TOLLEY,
Plaintiffs,

and

MARIT FIDEL; BERNARD FIDEL; JOEL BINDER,
Plaintiff-Intervenors-Appellants.

v.

HERBERT J. YOUNG; JAMES THAYER; JAY JANIS; JOHN R. WILLIAMSON; JEROME NUSSBAUM; MICHAEL W. MOONEY; LYNNE CRAWFORD; LINDA K. S. BLOUNT; ROBERT R. SPRAGUE; HOUSTON I. FLOURNOY; BERNICE H. HUTTER; MELVIN P. SPITZ; RAFAEL E. VEGA; GIBRALTAR SAVINGS; GIBRALTAR, F.A.; MELVIN RIFKIND et al.; GIBSON DUNN & CRUTCHER; KPMG PEAT MARWICK; ERNST & WHINNEY; ERNST & YOUNG; WILLIAM H. DUDLEY; RESOLUTION TRUST CORPORATION, as Receiver for Gibraltar Savings; MELVIN RIFKIND; RIFKIND, PONDEL & PARSON; KENNETH LEVENTHAL; RICHARD SPRAYREGEN; JEROME NUSSBAUM,

Defendants-Appellees.

CASE NO. 96-55622
D.C. NO. CV-90-06185

MEMORANDUM

FILED FEBRUARY 19, 1998
CATHY A CATTERSON, CLERK
U.S. COURT OF APPEALS

Appeal from the United States District Court
for the Central District of California
Mariana R. Pfaelzer, District Judge, Presiding
Argued and submitted November 5, 1997
Pasadena, California

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3

Before: CANBY and THOMPSON, Circuit Judges, and MOLLOY, District Judge.**

After carefully reviewing the arguments presented and the record, we affirm the district court's dismissal of the Glavaris plaintiffs, complaint and its denial of Bernard Fidel and Joel Binder's intervention motion for the reasons set forth by the district court in its thorough and well-reasoned Memorandum of Decision, filed on September 10, 1992; and Memorandum of Decision, filed on August 11, 1994. We also affirm the denial of Myron R. Stahl's intervention motion. The motion was not timely filed and intervention clearly would have prejudiced the parties in the Glavaris action. See County of Orange v. Air. Calif., 799 F.2d 535, 537-38 (9th Cir. 1986); Empire Blue Cross & Blue Shield v. Janet Greeson's A Place for Us, 62 F.3d 1217, 1220 (9th Cir. 1995).[1/]

We also affirm the district court's denial of Stahl's motion to amend his first amended complaint in Stahl v. Gibraltar Financial Corporation, No. 96-55201, and the district court's subsequent dismissal of that action with prejudice.

By his motion to amend, Stahl wanted to add officers and directors of Gibraltar Financial Corporation as defendants. He could have sought leave of the court to add these proposed defendants at any time after filing his complaint in 1987. He did not do so, but delayed filing his motion until October 1995, some eight years later. In addition to the passage of this inordinate amount of time, events occurred which should have prompted Stahl to seek leave to amend if he wanted to do so. He might have sought leave to amend upon remand of this case from our court in June 1992, or when the district court voiced concerns, in September 1992 and August 1994, about the Glavaris action proceeding as a class action, or when he himself informed the

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** Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.

1/ We grant the Glavaris plaintiffs' motion for reconsideration. In case number 96-55444, the oversized reply brief is ordered filed. The officers and directors' motion to strike the reply brief is denied.

district court in September 1994 that he intended to seek leave to amend to add the directors and officers.

Stahl offers no justification for the delay. It is clear he was aware of the underlying facts and potential claims against the directors and officers at least by November 1990, when the Glavaris action was filed. A delay of eight years in these circumstances is not justified. See Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990).

The directors and officers Stahl wanted to add as defendants would have been seriously prejudiced if forced to defend themselves in the Stahl action. They had never been parties to the action, and any claims against them would have set forth different legal theories as to them and would have required proof of different facts, which would have required significant additional discovery. Moreover, during the eight-year period of delay, two of the directors died, depriving the defense of their assistance in defending the action.

Although the district court did not set forth its reasoning in denying Stahl's motion to amend, the reasons for the denial are apparent from the record as set forth above. In this circumstance, the district court did not abuse its discretion in denying Stahl's motion to amend his first amended complaint. See Levald, Inc. v. City of Palm Desert, 998 F.2d 680, 691 (9th Cir. 1993).

AFFIRMED.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MYRON R. STAHL,
Plaintiff-Appellant,

v.

GIBRALTAR FINANCIAL CORPORATION,
Defendant-Appellee.

CASE NO. 96-55201
D.C. NO. CV-87-03147-MRP

JOHN GLAVARIS AND PATRICIA GLAVARIS;
BENNY L. TOLLEY,
Plaintiffs,

and

MYRON R. STAHL,
Plaintiff-Intervenor-Appellant,

v.

HERBERT J. YOUNG; JAMES N. THAYER; JAY JANIS, JOHN R. WILLIAMSON; JEROME NUSSBAUM; MICHAEL W. MOONEY; LYNNE CRAWFORD; LINDA K. S. BLOUNT; ROBERT R. SPRAGUE; HOUSTON I. FLOURNOY; BERNICE H. HUTTER; MELVIN P. SPITZ; RAFAEL E. VEGA; GIBRALTAR SAVINGS, F.A.; MELVIN RIFKIND; GIBSON DUNN & CRUTCHER; ERNST & WHINNEY; ERNST & YOUNG; WILLIAM H. DUDLEY; RESOLUTION TRUST CORPORATION, as Receiver for Gibraltar Savings; MELVIN RIFKIND; RIFKIND, PONDEL & PARSON;

KENNETH LEVENTHAL; RICHARD SPRAYREGEN; JEROME NUSSBAUM,
Defendants- Appellees

CASE NO. 96-55230
D.C. NO. CV-90-06185-MRP

JOHN GLAVARIS AND PATRICIA GLAVARIS; BENNY L. TOLLEY,
Plaintiffs - Appellants

v.

HERBERT J. YOUNG; JAMES N. THAYER, JAY JANIS; JOHN R. WILLIAMSON; JEROME NUSSBAUM; MICHAEL W. MOONEY; LYNNE CRAWFORD; LINDA K. S. BLOUNT; ROBERT R. SPRAGUE; HOUSTON I. FLOURNOY; BERNICE H. HUTTER; MELVIN P. SPITZ; RAFAEL E. VEGA; GIBRALTAR SAVINGS; GIBRALTAR, F.A.; MELVIN RIFKIND; GIBSON DUNN & CRUTCHER; KPMG PEAT MARWICK; ERNST & WHINNEY; ERNST & YOUNG; WILLIAM H. DUDLEY; FEDERAL DEPOSIT INSURANCE COMPANY, as Receiver as Receiver for Gibraltar Savings, F.A.; MELVIN RIFKIND; RIFKIND, PONDEL & PARSON; KENNETH LEVENTHAL; RICHARD SPRAYREGEN; JEROME NUSSBAUM,
Defendants-Appellees.

CASE NO. 96-5544
D.C. NO. CV-90-06185-MRP

JOHN GLAVARIS AND PATRICIA GLAVARIS; BENNY L. TOLLEY,
Plaintiffs,

and

MARIT FIDEL; BERNARD FIDEL; JOEL BINDER,
Plaintiff-Intervenors-Appellants.

v.

HERBERT J. YOUNG; JAMES THAYER; JAY JANIS; JOHN R. WILLIAMSON; JEROME NUSSBAUM; MICHAEL W. MOONEY; LYNNE CRAWFORD; LINDA K. S. BLOUNT; ROBERT R. SPRAGUE; HOUSTON I. FLOURNOY; BERNICE H. HUTTER; MELVIN P. SPITZ; RAFAEL E. VEGA; GIBRALTAR SAVINGS; GIBRALTAR, F.A.; MELVIN RIFKIND et al.; GIBSON DUNN & CRUTCHER; KPMG PEAT MARWICK; ERNST & WHINNEY; ERNST & YOUNG; WILLIAM H. DUDLEY; RESOLUTION TRUST CORPORATION, as Receiver for Gibraltar Savings; MELVIN RIFKIND; RIFKIND, PONDEL & PARSON; KENNETH LEVENTHAL; RICHARD SPRAYREGEN; JEROME NUSSBAUM,
Defendants-Appellees.
CASE NO. 96-55622
D.C. NO. CV-90-06185

ORDER

FILED JUNE 2, 1998
CATHY A CATTERSON, CLERK
U.S. COURT OF APPEALS

Before: CANBY and THOMPSON, Circuit Judges, and MOLLOY, District Judge.

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* Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation

The panel, as constituted above, has unanimously voted to deny the petition for rehearing. Judge Thompson has voted to reject the suggestion for rehearing en banc, and Judges Canby and Molloy recommended rejection.

The suggestion for en banc rehearing has been circulated to the full court, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and suggestion for a rehearing en banc is REJECTED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH DISTRICT

JOHN GLAVARIS AND PATRICIA GLAVARIS;
BENNY L. TOLLEY in their individual
capacities and on behalf of
all persons similarly situated
Plaintiffs/Appellants,

v.

HERBERT J. YOUNG, et al.,
Defendants/Appellees,

AND INTERVENORS' APPEAL

Appeal No.'s 96-55444 and 96-55622
(USDC # CV-90-6185-MRP)

ADDENDUM
(Transcript of Oral Argument Before The Court)

IN SUPPORT OF PETITION FOR REHEARING EN BANC

Robert H. Bretz, Esq.
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310/578-1957
Attorney for Plaintiffs/Appellants

UNITED STATES COURT OF APPEALS

FOR THE NINTH DISTRICT

JOHN GLAVARIS AND PATRICIA GLAVARIS;
BENNY L. TOLLEY in their individual
capacities and on behalf of
all persons similarly situated
Plaintiffs/Appellants,

v.

HERBERT J. YOUNG, et al.,
Defendants/Appellees,

AND INTERVENORS' APPEAL

Appeal No.'s 96-55444 and 96-55622
(USDC # CV-90-6185-MRP)

UNOFFICIAL TRANSCRIPT
BEFORE THE NINTH CIRCUIT OF APPEALS
On
November 5, 1997

PASADENA, CALIFORNIA,
WEDNESDAY, NOVEMBER 5, 1997; 9:00 A.M.

COURTROOM 3 — BEFORE: THOMPSON AND CANBY, Circuit Judges, and MOLLOY, District Judge sitting by designation

APPEARANCES IN ORDER IN TRANSCRIPT.

For Plaintiff/
Appellants: Robert H. Bretz, Esq.

For Defendant/
Appellees: Martin C. Washton, Esq.
Stephen A. Kroft, Esq.
Carey B. Moorehead, Esq.

The Court: Lets see, in the Stahl case, I suspect we're going to hear from Mr. Bretz.

Mr. Bretz: That's right Your Honor.

The Court: You are Mr. Bretz?

Mr. Bretz: I am.

The Court: O.K.

Mr. Bretz: Good morning. If it please the Court, I am Robert H. Bretz.

I am here on behalf of the appellants in a series of cases that I will generally describe as Gibraltar related cases, the Stahl

case, the Glavaris case, the Binder and Fidel intervention cases. Unless the Court has any questions at the out set you'd like to direct at me, I'll - - I'd like to make a few observations.

First, the appellants believe this is an important case. We believe this case presents the Court with an opportunity to confirm some long standing precedent of this court and of the Supreme Court. It also, presents an opportunity to address and resolve some new and some interesting issues and we think important issues and ... and thereby to help set some policy on some areas that I think need to be addressed. The, the court has a long standing series of cases that basically say our precedence dictates that the question of notice of fraud is for the trier fact and in the courts Admiralty Fund case of 1982, Volk v. Davidson in 1987, General Bedding in 1991, Nevada Power, 1992; Grey v. Winthrop is the latest expression of that long standing precedent in 1996. The district court, as the Court knows, looked at the Gibraltar October 30th press release and made a factual determination regarding whether or not that press release put investors on notice of possible fraud. Ah -- the court determined the evidence, I think was, "irrefutable and uncontrovertible". The court - - the district court I think had picked that up out of the only exception this Court has ever recognized as this long standing line of precedent. And the court's decision just cannot be right. Ah that press release ah - of the issue of notice should have gone to the jury and ah -- and all of the evidence that the District court had available to it, what was pled in the complaint, but also the evidence that was submitted in response to the court's oral request for a copy of the press release that the court treated as Rule 56 motion, all of that evidence suggested that everybody was fooled by that press release - - not informed by it. You'll recall the market price didn't move at all, although the court said the market price plummeted, it stayed at four and a half dollars. The writers for the Wall Street Journal and the L.A. Times didn't seem to discern what the court found to be absolute, and in fact

the Assistant Commissioner of California was quoted in - - in the L.A. Times article saying that the Commissioner -- Department of Savings and Loan sees no reason to be concerned. The auditors who subsequently audited Gibraltar, financial statements had certified made - - made -- ah -- no allowance for any losses, didn't seemed to recognize, if you would again, what the court found was absolute. So we think that is ah -- not only a determinative but it almost is such a key point that if the court decides the Court erred, the district court erred, in that regard, literally every other single decision the court made follows from that erroneous decision. The Court has some unique -- the -- the case has some unique facts to it. Ah -- my guess is, this court has never ah -- seen an instance where there were two sets of audited financial statements for the same audited period, the same year and the date of the end of the audited period. Ah, as you know, Gibraltar was representing that there were appraisals and comparisons of values that were used to -- to ah -- validate, if you would, the price that the real estate developments were being carried upon. Ah -- but, I think one of the -- one of the important issues that's framed by this case, is the relationship between inquiry notice, constructive notice and fraudulent concealment. Inquiry notice doesn't translate very well and it seems very difficult to me to apply it to the corporate setting, the financial institution setting. This case -- this court has a line of cases recognizing that for pleading purposes, per Rule 9(b) fraud pleading purposes, that there needs to be an exception that the average public shareholder isn't going to understand all the information that is behind, if you would, the "corporate doors".

The Court: I suppose its -- its that the district courts looking not just at the information and the release which is this horrendous loss but it comes on top of statements not very long before hand saying everything was rosy and -- and you know

Mr. Bretz: But -- well, Your Honor first

The Court: for the year and

Mr. Bretz: First -- first of all, I know this, in this day and age this sounds odd doesn't it? 155 million after tax affect loss -- its a lot of money to me.

But Gibraltar, I think was the seventh or eighth largest savings and loan in the country -- ah - its assets, I believe at that point in time, were 15 to 18 billion dollars. Gibraltar would have easily survived, as an institution, that loss. What really brought Gibraltar down in my mind and I believe the facts of the record will support that, was this un-hedged portfolio of mortgage backed securities, where -- ah -- the Federal Home Loan Bank Board of San Francisco had done a special audit and determined that there was - ah -- a 500 million dollar loss and that's what the Federal Home Loan bank Board determined was probably going to -- to cause Gibraltar's demise.

Now, to the courts question, -- ah -- the trends in the opinions and in this Court aren't "shoot now, ask questions" later. The trends are the Worlds Of Wonder case here in this Circuit, the Dileo v. Arthur Young case, I think, in the 7th Circuit, is that a large loss even if it is a big loss doesn't -- is not -- not necessarily indicative of fraud and -- and if it is, then do you understand that every plaintiff's lawyer when we see a big loss with that narrowing of the statutes of limitation that Lampf has rot wrought, if you would, ah -- you don't have a chance to do much investigation, and if I may, (729 on tape) and -- and although when you say everything is rosy, you remember that Gibraltar characterized the release in a way that was designed to answer your question.

It wasn't everything was rosy and -- and but "whoops" we've had a large loss before and we want to recognize it now and get it out of the way -- and get out of the real estate

business. They said we have decided to concentrate on our core business. We have a adopted a decision in the third quarter of 1987 to get out of that business and its this decision that has prompted us to decide to accelerate to sell -- and to accelerate the sale of our assets. And that accelerated sale of assets, the -- the supply and the demand equation if you would is not a perfect analogy, is going to cause us to take a loss; and so we are going to reserve against it now. And -- and I would argue that the district court saw a large loss reported but that loss was carefully crafted not to suggest that there had been impropriety. And if fact if you've read the -- ah -the articles, the New York Times article and the L.A. Times article, they kind of praised Gibraltar for getting out the real estate development business. This had kind-of-been a me -when Congress relaxed what savings and loan could do, Texas, Louisiana, California savings and loans had decided that the profits of the developers were making it look pretty attractive especially to the kind of staid, unexciting savings and loan business. So this press release was characterized in a away not to put anybody notice -- on notice of fraud and I don't think that not only didn't do that, I know it wasn't intended to do that. But it gave an excuse to why people should of actually thought this was a good idea. The market would suggest I am right. The financial writers would suggest I am right. The Assistant Commissioner of California Savings and Loan Department would suggest I am right. The auditors never -- ah -- took a position that there was wrongdoing, that there was fraud. And as you know, -- ah -- going back to my point that I think should be especially fascinating to this Court -- the relationship of constructive fraud to fraudulent concealment and in this case -- ah -- what I believe and I hope this Court believes is a serious abuse of trust -- by forming this so-called "independent" special investigation committee, that lulled the investors into believing that - that there was an ongoing meaningful investigation as to whether or not this large loss was the result of anything other than it had been represented to be. And, as you know, this special

investigation committee determined there was no actual wrong doing by Gibraltar's management, as it related to the announced real estate losses. The district court, of course, totally ignored the real omission in that October 30 release that had to do with the the bond losses.

Now, I believe, as I've tried to analyze this, I believe that where there is -- ah -- evidence of fraudulent concealment that -- that the law ought to be that - that the use of -- cons -- inquiry notice and constructive notice is precluded. Certainly in a context of a 12 (b) (6) motion, - - you know - - how do you fa - - how do you parse out the effect of the - - of the special investigation. How do you parch out the effect of the letter of April 24, 1980, -- ah -- 9. saying that even though they've imposed a conservatorship on us -- ah -- it was illegally, we're going to fight it. How - - how would an average investor believe that, after a special investigation has been conducted, that the average private investor could do anything. So again, I -- I think that the evidence of fraudu ... fraudulent concealment ought to preclude the effect of - - of inquiry notice and constructive notice and... and even if we didn't have the egregious example of the... of the misuse of a special investigation committee here -- ah -- if this Court will reflect on what the Wool v. Tandem Computer and the Moore v. Kayport cases mean -- where we've decided to relax the pleading standards under Rule 9(b).

The - its -- it -- its not realistic to believe that the average public shareholder in a publicly held corporation, within a year's period of time, is going to conduct any meaningful investigation of the -- of a financial institution like Gibraltar Savings without the help of management and... and discover anything. And, of course, the anomaly of what Judge Pfaelzer -- the conclusion that she came to here, although she never really addresses the second prong of constructive notice, were there facts that put an average investor on notice and what were

the reasonable facts he could of discovered if he didn't sit on his rights -- if he actually conducted a reasonable investigation? She never ad ... addressed that prong. She jumped over that prong, but the -- but the interesting thing is she concluded they would have discovered what the special investigation committee couldn't discover. That just doesn't make any since to me.

The Court: When was the special investigative committee constituted?

Mr. Bretz: Ah -- did -- you say when or how, Your Honor?

The Court: When.

Mr. Bretz: It was constituted shortly after the announcement of the loses which as you know took place in October of 1987 --

The Court: Right.

Mr. Bretz: -- and a shareholders derivative action was flied -- ah, in November of 1987, 1 believe it was ...

The Court: Why ... why was that committee constituted?

Mr. Bretz: - well - ah -- ah --, after the shareholder derivative action was filed on, I believe its October 17th, in Delaware and GFC, Gibraltar Financial Corporation is a Delaware corporation, in the shareholder derivative action setting, the directors of a corporation can preclude, if you would, a shareholders -- ah -- ah -- derivative action by forming a special investigation committee and deciding whether they want to want to take -- take control of that litigation that is a -- an -- instrument in Delaware law; and is being used, quite broadly now, for the corporation to retain control over litigation

that involves important corporate matters but -- by subjecting it to a truly vigorous independent investigation, independent members of the board of directors here. There should of been independent counsel, where there was not - -

The Court: The derivative action --

Mr. Bretz: Prompted --

The Court: filed October 17th --

Mr. Bretz: 17th of 87, Your Honor.

The Court: 87 --

Mr. Bretz: Right.

The Court: -- and the press release was September 30 --

Mr. Bretz: October 30.

The Court: October 30.

Unidentified Speaker: Yes.

Mr. Bretz: Did I say that right? October 30 is definitely the release and November 17th I believe is the shareholder derivative --

The Court: Nov -- November 17th on that.

Mr. Bretz: I miss November, right.

The Court: O.K.

Mr. Bretz: Now the -- the. Your Honor I think that unless you have any questions, I like to reserve the balance of my time for rebuttal.

The Court: That will be fine.

Mr. Bretz: Thank you.

The Court: Ah -- now I am not sure on this line-up on who we're going to hear from first, so just pop up and announce yourself and we'll check you off.

Mr. Washton: Morning.

May it please the Court, Martin Washton -- ah -- Mr. Kroft and I are going to share about 16 minutes and then we'd like -- ah some chance -- ah ... ah to -- ah -- answer any questions and permit others who are attending to -- ah -- answer any questions, or speak as well.

With respect to the -- the first issue that is -- ah -- what Mr. Bretz now alleges to be the major issue which Judge Pfaelzer ignored an finding that the October 30th press release, Wall Street Journal article, the New York Times article, the suspension of the dividends, the announcement of 250 million dollars in losses, a 153 or 154 after taxes, one of the largest quarterly losses ever announced, based upon. Mr. Bretz own allegations the price plummeted three dollars a share, again based upon the record created by Mr. Bretz --

The Court: He said the price didn't drop --

Mr. Washton: I -- I -- I understand that, Your Honor, I -- I -- I suggest to you that the Court's memorandum of decision makes it clear that the court relied upon Mr. Bretz' own pleadings in making that determination. Mr. Bretz says the

real issue was the failure to disclose the 500 million dollar loss in the press release, well its understandable that Judge Pfaelzer didn't focus on that because Mr. Bretz didn't focus on it in his complaint and unfortunately the description of the cause of action in the brief is not consistent with what's alleged in the complaint in fact the first time there is any mention of this issue of the -- ah -- bond losses in the complaint is at page 100 of the Second Amended Complaint and there it is alleged that following a special audit ah -- the Federal Home Loan Bank Board notified GFC and Gibraltar on or about October 20, 1987, that they had determined that were --- there were -- was unrealized loss and I underline that unrealized loss of approximately 500 million in the portfolio of fixed rate mortgage backed securities. An unrealized loss is what those of us who have pension plans suffered a couple of weeks ago when the stock market dropped 500 points. Unreal ... unrealized loss merely means that when you have bonds that have a fixed interest rate and interest rates fluctuate the value of those assets may fluctuate but its not a loss ... its not a loss which Gibraltar was required to disclose, its not a loss which Gibraltar to recognize. It was the kind of loss that any intelligent reader of Gibral --- Gibraltar financial statement could determine for himself by taking a look at what they own, and taking a look at what was going on in the market and determine whether or not those values will fluctuate. That's why Judge Pfaelzer didn't make note of that, the complaint didn't make note of it and what happened on October 31st.

Not only was the loss announced and dividends suspended but, in fact, it took no longer than three weeks for a derivative action be filed -- and five fraud class actions. Apparently, there was enough notice after the months and years of rosy statements, that everything was fine, that it was going to be another profitable year and that everything was -- was loo -- loo - looked ros -- rosy and looked bigger and better in the future. The institution was growing and it was profitable,

and suddenly they announced this loss, suddenly they suspended dividends. Its reported in press all over the country; and in fact six law suits have been filed in three weeks. I -- I submit that the inquiry notice doesn't mean the stockholders have to go out and make an investigation. Inquiry notice, when you are alleging fraud on the market, is was there information -- inconsistent information out there on the market, inconsistent with the prior rosy statements of management, which put stockholders on an inquiry notice to file a complaint. Certainly it resulted in the filing of such pleadings.

The Court: Mr. Washton, -- ahmm -- you make a pretty could arg ment -- ah -- that would extend or would include the officers and directors of the company. Maybe the auditors whose -- whose names are on the financial statements. Maybe not. Ah -- ah how about the attorneys. Were investors then put on inquiry notice -- as -- that there might be some fraud involvement by the attorney's, the accountants and the public relations people?

Mr. Washton: I think anybody who had any responsibility -- ah -- in a public way, for the prior public statements -- ah -- think that would be true. I think I'll let Mr. Kroft talk about the attorney issue because that one is a little close to heart, and -- ah -- that's why Mr. Kroft is here. But I would submit, Your Honor, based upon the allegations in this complaint, that the -- a -- auditors role was notorious in -- in approving the prior positive statements, that some how the attorney's were involve in drafting the prior positive statements, certainly it put -- ah -- anybody on an inquiry notice that something was wrong --

The Court: Is this because -- ah -- the general investing public should be put on inquiry notice that lawyers and accountants get involved in financial press releases and large

corporations typically have public relations people that help draw these, or probably draft them in the first place, then run them by lawyers and accountants --?

Mr. Washton: Well that's .. that's exactly what is alleged in the Complaint and for that reason we would agree -- your, that's the kind of inquiry notice that's created by the events that occurred in October and November of 87. Ahm -- I will also, ought to address that -- an -- we don't believe that -- ah -- we -- we're satisfied that inquiry notice caused the statute of limitations to run. I also briefly wanted to address the tolling issue, because - ah -- Mr. Bretz made much of it in his brief, and our position is that under the American Pipe case the only claims which were tolled were claims that were filed in those fraud class actions that were initiated in November of 87. And those were only stockholder class actions. There were no bond holder claims at all, and I think the -- Mr. Bretz himself acknowledges, that bondholders are different than stockholders. The responsibilities of officers, directors, professionals are different to creditors than they are to stockholders; and in fact the markets operate differently. The stock market can fluctuate widely. The bond market tends to fluctuate in reaction to interest rates in reaction to what's going in the stock market and the only time the -- ah -- bond market is adversely affected is -- is when it becomes apparent that the corporate creditors can be unable to repay the debt.

So, that, we don't believe there is any basis for -- ah -- tolling of any of the bond claims and that's why we believe that Judge Pfaelzer is correct in making all the statutes of limitations decisions that she did, including the proxy fraud claims -- ah -- which have not been alleged -- ah -- in a class action.

The Court: What about tolling any of the stock claims, was there any issue on that?

Mr. Washton: The -- the only issue on the tolling of a stock claim was -- it was tolled with respect to Mr. Young because Mr. Young had been named as a defendant In Re Gibraltar and -- ah -- that claim was settled -- ah -- that claim was set for trial, and settled.

Unidentified Speaker: That's right.

Mr. Washton: -- uhm -- the -- the only other claims were -- ah -- proxy claims and -- ah -- there were also some common law claims which were also barred by the statute of limitation because the same three year statute of limitations, that if adopted under the -- ah -- lOb-5 claims, applied to the state fraud claims. Ahm -- there was some mention by Mr. Bretz of this when our case -- ah -- because -- per -- at some point in time he claims there was a case that named all of the officers and directors or several of the officer and director defendants which was subsequently -- a -- dismissed; but that issue was never raised in the court below and there is nothing in the record that this Court can rely on in even passing upon that, in fact the Winnard case didn't even allege the very common law claims for which Mr. Bretz sought tolling when he asserted tolling by reason of the In Re Gibraltars securities litigation.

The Court: Let me ask you -- ah -- before you get away here, -- uhm -- we have - ah -- an appeal by -- ah -Glavaris before us --

Mr. Washton; Its really the Glavaris case, Your Honor, that I think both Mr. Bretz and I have been focusing on because the Glavaris case is the significant -- ahm -- securities claims, the common law claims, the Stahl case was filed in April of 1997 --

The Court: Let -- let me bring you back to Glavaris, Glavaris also settled in this case. Now how come we got this

appeal when he settled, is he -- ah - - was the settlement that he permitted him to appeal the issues on which the Court had previously ruled.

Mr. Washton: Exactly. When that case was settled -- ah -- his individual 10b-5 claim was settled and all other claims which had been dismissed --

The Court: Right.

Mr. Washton: -- were reserved for appeal; they were not dismissed --

The Court: - O.K.

Mr. Washton: -- and that's why we're here today.

The Court: O.K.

Mr. Washton: Uhm -- If the Court has no questions, I would like to turn it over to Mr. Kroft, because I know we have a lot of issues to cover.

The Court - O.K.

The Court: That ... that was Mr. Washton ... yeah.

Mr. Kroft: Morning.

The Court: Morning.

Mr. Kroft: I am Stephen Kroft, Your Honor. I represent the law firm of Gibson Dunn & Crutcher, which was the attorneys for Gibraltar Financial Corporation during the 1980's. I appreciate the Court's question about the statute of limitation

pertaining to attorneys, and I want to get to that in just a moment.

The Court: O.K.

Mr. Kroft: I want to start by saying, the record is undisputed that there was no purchase of any security by the plaintiffs in this case based on anything that was said or done in 1988 or 1989. There was apparently a purchase by Mr. Glavaris of a bond in June of 1989, but that was after the FSLIC had seized Gibraltar and all of its assets. So this case is really about what happened in 1986 and 1987. And with respect to 1987, I think it is important to look at the Grey v. Winthrop case, -- ah -- Judge Canby, I think had it just right -- when you have rosy predictions or mixed discussions and all of a sudden there is a clamorous bunch of news that starts inquiry notice even in a non-fraud on the market case. In the Grey v. Winthrop case, there did come a point where the court said, look there was such a big jolt of news we'll say at that point inquiry notice occurred, but the complaint was filed on time, before the date of that inquiry notice. Uhm -- there is no tolling issue by the way, Judge Thompson with respect to the attorney in this case because the attorneys were never defendants in any of those class actions filed in 1987 and 1988.

I think it is important to focus on the fact that this is a fraud on the market case, and that changes the inquiry notice analysis. The Cook case in the 4th circuit, and Judge Pfaelzer herself with pages 25 and 26 of her Memorandum of Decision, said that when the market is on inquiry notice that starts the statutes of limitations running. That is a little bit different than a situation such as the one posited by Mr. Bretz, where he says, well, can anybody find out when the market is on inquiry notice of enough to make an inquiry, that starts a statute running. That's, as I say, with the Cook held - - the Cook case held; and

that's what Judge Pfaelzer held. That makes perfect since, because how could you say that the statute of limitations doesn't start running for a particular plaintiff until he receives inquiry notice of a falsehood that was never communicated directly to him in the first place, it was only communicated to just the market. Just wouldn't make any sense. And with respect to the Court -- the Courts question about, would there be inquiry notices as to the lawyers. I think the fraud on the market analysis answers that in part. Its also answered, even if this was not a fraud on the market case, by the Bernson decision in the California Supreme Court which was cited in our brief and also by this Court's In Re Stac Electronics decision. Those cases make clear, that when a plaintiff is on inquiry notice as to claims of fraud against the corporation and its management, its on inquiry notice as to all participants in the allegedly fraud -- fraudulent scheme. Even if the plaintiff at that time doesn't know the identities or their involvement and that -- that rule ought to apply specially to Gibson, Dunn & Crutcher here, Your Honor, because Gibson, Dunn's representation of Gibraltar was well documented and it was easily ascertainable -- its name did appear in the 1987 proxy and also the 1988 proxy. So, I don't think there is any problem in dealing with the inquiry notice issue for the attorneys.

The Court: Well Mr. Kroft in -- I -- I -- I guess I might rock along with you, on your theory that well -- well let me just suggest, that lawyers and accountants are typical targets in any

kind of a -- a class action suit that's going to be brought against a company that fails --

Mr. Kroft: They sure are and in this case --

The Court: -- it -- its just the first ones you think of and their insurance companies and everything else. What about the

public relations firm, or is there someone else going to talk about the public relations firm?

Mr. Kroft - I don't represent the public relations firm, Your Honor, but again, the Bernson holding, says it doesn't matter if you don't know whom all of the participants were. When you're on inquiry notices to some, you have to sue and the way you can deal with that is you sue Doe Defendants -and if your discovery demonstrates to you that the public relations firm was involved you can substitute them for the doe party.

The Court: Well let --

Mr. Kroft. The Supreme Court of California was very clear about that --

The Court: Yea -- ah -- ah -- ah you know a -- a -- a -- reasonably sophisticated investor I think would know that when a company has good news or bad news they have -- ah -- public relations people that prepare the press releases and then run them by accountants and lawyers -- ah -- at least lawyers, -- ah -- but is that -- are they within this ambit of people who would be typically ... you ought to be on inquiry that maybe the public relations people here are at fault. I -- I -- I am just -- they seem a little beyond lawyers, accountants officers and directors.

Mr. Kroft: The public relations people's lawyer would probably say there way to far away to even be in this case. But I think the Bernson decision, Your Honor, does answer that questions -- California Supreme Court's decision.

I do want to emphasis that this isn't just a statute of limitation case, at least as it pertains to my client, the attorney's for Gibraltar Financial, because we don't believe there is anything pleaded in the complaint that states a claim against Gibson, Dunn & Crutcher. Judge Pfaelzer held that was so, in

part, and in part she didn't reach it because she ruled on statute of limitations grounds as to some of the claims. With respect to the l0b-5 and actual fraud claims that were served against Gibson, Dunn in this complaint, those claims basically rest on two general sets of allegations. The first is general allegations that Gibson, Dunn, I want to quote this, "drafted or otherwise prepared", or "participated in the drafting and preparation" of various public Gibraltar documents. You can find that at pages 67 and 73 and 79 to 81 in the complaint. But the problem with those allegations, is they don't say what exactly in those documents if anything Gibson, Dnn & Crutcher actually drafted and they certainly don't say that Gibson, Dunn & Crutcher drafted anything in those documents that was false. Innuendo that Gibson, Dunn & Crutcher may have done something wrg or maybe drafted something false is in that complaint. But innuendo doesn't substitute under Rule 9 (b) for specific factual allegations that this party did something that was false.

The Court: - Suppose we disagree with you, does it make any difference if Judge Pfaelzer was right on her statute of limitation decision?

Mr. Kroft: Well, if she was right on her statute of limitation decision then this whole case goes away. But I am saying, even she was not right, it still goes away as to the attorneys.

The second basis on the complaint for trying to hold Gibson, Dunn in this case, is the allegation - - is because Gibson, Dunn represented Gibraltar Financial Corporation, it owed a fiduciary duty to the shareholders, not only the shareholders, but the bondholders of the corporation, the debt holders, to publicly disclose everything that Gibson, Dunn & Crutcher had learned from its corporate client. Now we've cited cases at pages 47 and 48 and 54 and 55 of our brief that make it clear that, just because Gibson, Dunn & Crutcher was

a corporate attorney, it did not have a fiduciary obligation to blow the whistle on its client and make public disclosures to the -- to the shareholders and the bondholders. In fact, as the attorney for the corporation, Gibson, Dunn & Crutcher had a duty not to disclose information it received in confidence from its client.

Mr. Bretz raises a very interesting issue in his reply brief, in footnote 29, about the proxy fraud claim. He assumes that the Lampf analysis that applies to, one year, three year statute of limitation to l0b-5 actions, also would apply to 14 (a) proxy fraud claims; and I think he's right. What he says though is that analysis shouldn't be applied here because just like l0b-5 claims that were filed before June 1991 get to take advantage of the old statute of limitations, so should the proxy fraud claims. The problem with that analysis is the only way he gets there is that Congress passed a statute saying so in reaction to Lampf Section 27(a) of the)34 Act, but that statute only, specifically on its face, applies to 10b-5 actions not to proxy fraud actions, so I think the one year, three year Lampf statute does apply to the proxy claims, and specifically with respect to the 1987 proxy claims. Those claims would of started to run under the three year statute of repose when the 1987 annual meeting occurred in May, and three years it would of run in May of 1990. That was six months before this complaint was filed. And of course, after Central Bank there is no aiding and abetting proxy fraud claims just as there would not be an aiding and abetting l0b-5 claims. Judge Pfaelzer found that to be so on page -- like page 56 of her second Memorandum of Decision, and I think she is exactly right.

The last point I would like to make, Your Honor, is that with respect to the state law fraud and negligent misrepresentations claims that are set forth in the eighth, tenth and eleventh causes of action, those are state law claims. Under the California Supreme Court decision in Mirkin v.

Wasserman, plaintiffs can't pursue a fraud on the market theory for those claims. Plaintifffs have to plead actual individual reliance, they can't rely on the market. This complaint doesn't plead actual reliance in the way that Rule 9(b) requires. There are general allegations of reliance, I can give the Court the paragraphs if you'd like so that you don't have to go thumbing through this 150 page complaint, but there are no specific allegations that any of these plaintiffs actually read any false statement much less that they purchased any particular security based on any statement that they may have read that they claim is false. If the court has any other questions, I'd be happy to answer them, otherwise I think that concludes it, and gives us about - -

The Court: Apparently not Mr. Kroft

Mr. Kroft: -- ah .. do you have any other questions for anybody else on our side, I think we have a couple of minutes left, Your Honor?

The Court: Ah - no I don't ... ah, apparently not.

Mr. Kroft: I don't know if Mr. Washton has any thing to add.

The Court: Do the public relations people want to say anything at all?

Mr. Moorehead: We are head counsel for Melvin Rifkind and Rifkind, Pondel & Parsons. I'd like to echo basically what Mr. Kroft had to say.

Our clients were not defendants in any of the prior litigations. There would be no tolling with respect to them -- ah -- the complaint alleges similar to what was alleged against Gibson, Dunn & Crutcher, that we were -- that our clients were

involved in preparing certain documents. Uhm - - I think the Bernson case -- ah -- really does speak to that issue. Once the plaintiffs were put on notice, the market was put on notice of potential claims against Gibraltar, -- ah -- the statute of limitations began to run, they were on inquiry notice and at that point had the opportunity to conduct investigations, retain counsel, to conduct discovery and find out about Melvin Rifkind and Rifkind, Pondel & Parsons or anyone fulfilling that function.

The Court: And, now, your name was sir?

Mr. Moorehead: Terry Moorehead.

I understand that the Court did not receive my acknowledgment, we didn't receive that back in the mail, I can't explain why you don't have it.

The Court: Gotcha. Thank you Mr. Moorehead. O.K. Mr. Bretz.

Mr. Bretz: Your Honor -- Your Honors, I am struck as I hear three lawyers that addressed you tell you how an average public investor should be expected to launch an investigation after that October 30 press release and -- and discover fraud that ranged from retroactive indemnity agreements, to the capital maintenance agreement, to the bond losses, to the special investigation, if -- if that person is suppose to find fraud that ranges from not only the management but accountants and attorneys and financial public relations, I stand by my argument in this Court -- it isn't feasible, its not realistic and there -- there is only one case in California that addresses the issue as to the scope of the duty to investigate and -- ah -- inquiry notice, its call Courtney v. Warring, its not the case that the other sides is mentioning. Courtney v. Warring, cited in our brief, says that even though you are of inquiry notice on fraud

as is to management, it does not extend beyond that -- absent some additional facts. Now, Mr. Washton said that Judge Pfaelzer relied upon pleading in my complaint that the stock price -- that the stock price plummeted. Its not there. I don't know why he would say that, -- ah -- I believe I know where Judge Pfaelzer came up with that. She came up with that in an argument we had made in a different case, about a different time frame, but he miss speaks himself when he tells you that we alleged the stock price plummeted. The stock price didn't budge an eighth, if you would, aft -- after that October 30th announcement hit the street.

I am confused by Mr. Kroft's sta....

The Court: Just when did it budge?

Mr. Bretz: Ah -- I don't have that off the top of my head Your Honor, but it drifted down only slightly. You'll recall this was, there -- there are some interesting historical facts that were visit on here, the October 19, 19.. 8 ... 1987 stock crash. This in one of the -- ah -- ah -- ah -- one of the few companies that didn't have a big loss. As you know, we allege that Gibraltar used that opportunity, of bad news for everybody to - - to make this October 30th release, they had -- had made no decision to get out of the real estate business. But the stock price didn't ever plummet, it didn't ever give anybody a signal that there is the kind of wrongdoing, i.e. possible fraud, that ah -- that -- ah -- the other side hopes you'll discern from that release. I also, think it is a very interesting point, the Court has just recently issued a case ah called -- ah -- one in a series of cases, Epstein v. MCA. And in Epstein the Court was particularly harsh on a plaintiffs lawyer who settled a shareholders derivative action without really taking care of his client. Well that same lawyer settled the Gibraltar shareholder derivative action, no money paid to Gibraltar, no money paid by

the officer/director defendants, he walks away with quite a bit of money. But the interesting thing is aft...

The Court: Hows it help your case?

Mr. Bretz: Well let me make this point. After -- ah -- the settlement had been arrange Mr. LeRach got to conduct discovery, and one of the items in this records is Mr. LeRach's declaration after he had con -- conducted the discovery. We're asking the -- the average investor to have discovered ... a guy who is one of the preeminent plaintiffs forensic lawyers in the country -- he says I didn't find any smoking gun of fraud here. Once again, how is the average investor expected to have done that? Ah -there, Mr. Kroft says that -- ah -- that this -- this is a fraud on the market case. That's not true. Its a fraud on the market case and its an individual reliance case. He says the plaintiffs don't plea they actually read and relied upon corporate communications. That is not true. John Glavaris was a very diligent investor. He read everything that Gibraltar sent him. And, one of the major errors that Judge Pfaelzer made here, is after she determined that the October 30th release would have put the market on notice of possible fraud, she -- and she decided that would of happened by November 3, so in her quote "Period 2" - - it starts November 4, she never inquired as to whether or not Gibral... ah - - John Glavaris or Benny Tolley ever got that press release, the Court will recall, was not mailed to anybody. Ah -- these people live in -- in different areas than -- than the Los Angeles area; and, so, she just assumed that they -- they knew about it which they didn't know about it. You'll recall John Glavaris completed a purchase of stock on November 4, and if he thought there was possible fraud at the company, I doubt he would of done that. But this is an individual reliance case and after Judge Pfaelzer - - we believe erroneously - - decided that press release put people on inquiry notice and the conduct of the special investigation didn't -didn't stop with it or interfere with it, she needed to go the next step

with John Glavaris and say, by the way, did you get it, when did you learn? Because he does have his individual reliance claim and, more importantly, there is no fraud on the market in California. But you don't have to buy stock in what Judge Pfaelzer describes as period two to have a claim for breach of fiduciary duty, constructive fraud, fraud. She imposed an in connection with the purchase and sale of securities on all the plaintiffs, and all the class, on the state law claims. That was not right. Now, Mr. Washton said, that we argued the Winnard case served to toll John Glavaris' and the classes' Rule 10b-5 claims, he says against Mr. Young. Well it wasn't just Mr. Young that was named as a defendant in the In Re Gibraltar series of cases. There were seven or eight officers/directors named. And Ernst & Young was named just -- its just a mistake by Judge Pfaelzer if she's -- if she's going to acknowledge that In Re Gibraltar stays the claims against Mr. Young because he's an defendant In Re Gibraltar, she -- she has to also rule that -- that same tolling effect works for all the defendants that were named. Ah -- and I am not going to list their names of. They are in my brief. The -- ah -- a American Pipe, one of the other - - I think very interesting questions here. American Pipe and Crown Cork say that in a Rule 23 context, when somebody files a complaint and the facts in the complaint are sufficient to put the defendants on notice of -- of the kind of claims that are being alleged the generic -- ah -- group of plaintiffs, the amount of money that's involved they -- we've -- we've satisfied what the statute of limitations is -- is set up to accomplish. When the in Re Gibraltar complaints, plural, were flied they alleged wrongdoing that -- that should have encompassed both stock claims and bondholder claims -- public debt, public convertible debt. Why is it any different than stock? Why weren't the defendants put on notice of this potential series of claims? We argue that the filing of the In Re Gibraltar case not only -- ah -- ah -- served to toll, and put people on notice of the stock claims, but in bondholder claims too. And the other side does not rebut -- ah -what -- what -- I

was told - - and that's don't file that Glavaris complaint right now we are in negotiations with the insurance company to -- to settle both the stockholders and the bondholder claims, and your only going to disrupt things.So everybody was thinking it covered the bondholder claims too. I don't know why the bondholder claims weren't settled when In Re Gibraltar was settled - - other than more money. Maybe the insurance company just wasn't willing to settle at that point in time. But we argue that the American Pipe line of cases, and this courts Robin v. Fluor case, served to toll the statute of limitations on the various claims that Judge Pfaelzer decided -- ah -- had been lost because of this October 30th press release.

The Court: Mr. Bretz, -- ah -- your time has expired, lets see if we have any questions from the Court.

The Court: Yes I was -- I was looking in your brief where you make a ... 1st side of tape finished ... rest of question -- not finished at beginning of side two of tape).

Mr. Bretz: (Tape picks up at) ... but the Federal claims were both fraud on the market ... If John Glavaris had bought at four and a half dollars a share and the market, if you would, had been fooled by all the prior false misleading statements, as you know the concept is he -- he is indirectly damaged because the market price he pays is too high, but --but traditional Rule 10b-5 causes of action are individual reliance causes of action; and they are pled in the complaint too, Your Honor.

The Court: I guess than the question is, how they're supported and (tape bearly intelligible, but maybe says supported by affidavits).

Mr. Bretz: Well, remember, this was a 12 (b) (6) motion ah - -ah -- this -- this was ah -- ah -- ah -- all these plaintiffs

were dismissed, ah, while a stay was in effect
(Unintelligible because two persons speaking at the same time).

The Court: No discovery?

Mr. Bretz: No discovery.

The Court: O.K. (Unintelligible because two persons speaking at the same time).

Mr. Bretz: A very important point, -- ah -- may I have -- may I have one more minute, Your Honor?

The Court: Sure.

Mr. Bretz: Ah -- ah -- Mr. Kroft argued eloquently -- 140) that attorneys aren't supposed to have to blow the whistle on their clients -- ah -- I believe that. Ah -- but you'll recall that Gibson, Dunn stood up at the 1987 shareholders meeting and vouched for the accuracy of the -- of the proxy statement that said there was no basis for any claims, that the proxy statement was accurate and complete, but didn't disclose the capital maintenance agreement which really precluded Gibraltar Financial Corporation, if it ever got in trouble paying on the debt securities. Ah -- Gibson, Dunn -- ah -- gave press interviews, I don't understand how they can still maintain to this Court, that if I maintain my traditional -- ah -- ah -- attorney as confidential consultant. I am not required to have to -- ah -- to tattle on my client, but O.K. But when I am giving press interviews, does that mean -- mean that if I made a false statement that I get to come back and say that doesn't count? And how about the special investigation?

When your Honor says, well gee, everybody kinda knows to sue accountants and lawyers -- ah -- the trend is now - - is please don't just sue them because they have deep

pockets. Please have some factual basis to do it. Where was the factual basis to believe that Peat Marwick, or Ernst or -- or the -- the public relations firm or Gibson, Dunn had done anything wrong? And, Your Honor, if you had read that Gibraltar had -- had formed a special investigation and Gibson, Dunn was heading it up, would you assume that they would have taken that assignment if there was any question that they had done anything wrong? Well, of course not. And I ask this Court, once again, to step back - - remembering the -- the plight of the average public shareholder - - even if you don't have things like the special investigation. The - - the average shareholder doesn't have any ability to go out and investigate at the level that these people are arguing they could have and should have. If there are no other questions, -- ah --I appreciate the extra time.

The Court: Ah -- appear not to be. Thank you -- ah -- Mr. Bretz. And thank all counsel for -- ah -- their briefing and then for their arguments. Ah -- the case just argued will be submitted and we will be in recess until 9:00 A.M. tomorrow morning.

DECLARATION OF DEBBIE De VISO

The undersigned hereby declares that the foregoing unofficial transcript was prepared from a tape obtained by me from the Clerk of the United States Court of Appeals for the Ninth Circuit and is, to the best of my ability, an accurate and complete transcription of such tape recording of the oral argument before the Court on November 5, 1997, in the within captioned appeal.

This Declaration is given under penalty of perjury under the laws of the United States of America, and is made in Marina del Rey, California, on April 6, 1998.

DEBBIE DEVISO
Debbie De Viso

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I, Debbie De Viso, am employed in the county aforesaid; I am over the age of 18 years and not a party to the within action; my business address is 520 Washington Boulevard, #428, Marina del Rey, California 90292.

On April 6, 1998, I served the foregoing document described as: "ADDENDUM (Transcript of Oral Argument Before the Court) IN SUPPORT OF PETITION FOR REHEARING EN BANC" on the following interested party(ies) by depositing true and correct copies of such document in the U.S. Mail, in a sealed envelope, postage prepaid, addressed as follows:

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I am readily familiar with the business practice of my place of employment in respect to the collection and processing of correspondence, pleadings and notices for mailing with the United States Postal Service.

Executed on April 6, 1998 in Marina del Rey, California.

X (Federal) I declare that I am employed in the office of a member of the bar of this Court as whose direction the service was made.

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APPENDIX D

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOHN GLAVARIS AND PATRICIA GLAVARIS;
BENNY L. TOLLEY in their individual
capacities and on behalf of
all persons similarly situated
Plaintiffs

v.

HERBERT J. YOUNG, et al.,
Defendants

CASE NO. CV-90-6185 MRP

MEMORANDUM OF DECISION

FILED SEPTEMBER 10, 1992
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

On October 7, 1991, the Court took under submission the Motions to Dismiss under Fed. R. Civ. P. 12(b)(6) and 9(b) of defendants Richard M. Post ("Post"); James R. Boyle ("Boyle"); Dean W. Harrison ("Harrison"); Jerome Nussbaum ("Nussbaum"); Rifkind Pondel & Parsons, Melvin Rifkind, ("Rifkind"); William H. Dudley, Ernst & Whinney, Ernst & Young ("Ernst"); KPMG Peat Marwick, Alvin Kang ("Peat"); and Gibson, Dunn & Crutcher ("Gibson").[1/]

The Court has treated these motions as motions to dismiss under Rules 9(b) and 12(b)(6) except as to one issue. For the purpose of determining the date by which the plaintiffs should have discovered the alleged fraud, the Court has considered matters outside the pleadings[2/], as well as matters subject to judicial notice[3/], and treated

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[1/] Defendant Warren P. Glupker filed a motion to dismiss which was scheduled for hearing on April 6, 1992. The Court took this motion under submission as well.

[2/] The Court requested from both plaintiffs and defendants a copy of the Gibraltar Financial Corporation ("GFC") press release dated October 30, 1987. Plaintiffs, in addition, presented evidence of newspaper reports and other evidence relating to GFC's October 1987 disclosure of its losses.

[3/] There are additional references in this Memorandum to allegations and arguments made in actions filed in the Central District of California relating to the same events as those involved in this action. The complaints filed in several of these actions were submitted to the Court by various parties as part of the record. The Court also requested other files from the Clerk of the central District and has made reference to them in this Memorandum of Decision.

the motions as ones for summary judgment. Fed. R. Civ. P. 12(c). Having done so, the Court now grants in part and denies in part the motions of certain defendants and grants the motions of others in their entirety. Since this is the third complaint filed by plaintiffs and they have been given many opportunities both to plead and to argue their theories, legal and factual, further amendment will be permitted only as indicated below. Except as specifically indicated, all claims ordered dismissed by this Memorandum are dismissed with prejudice.

DISCUSSION

I. FACTUAL BACKGROUND

This class action was filed on November 16, 1990, alleging multiple claims under the federal securities laws and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq., as well as supplemental state law claims against Gibraltar Savings[4/], directors and officers of Gibraltar Savings, and directors and officers of

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[4/] Gibraltar Savings is a wholly owned subsidiary of GFC and is currently under the control of the Resolution Trust Corporation ("RTC"). GFC is in bankruptcy proceedings and is not named in this suit. The term "Gibraltar" is used throughout their Second Amended Complaint without specification of whether the acts alleged were the acts of the parent or the subsidiary.

Gibraltar Financial Corporation ("GFC") [5/] and GFC's attorneys[6/] accountants[7/] and financial Public relations

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[5/] Herbert J. Young, Chairman, CEO, President of Gibraltar until 3/88.

James N. Thayer, Board member, President of Gibraltar as of 3/88.

Jay Janis, Board member, Chairman of Gibraltar as of 3/88.

John R. Williamson, Board member, CFO, Executive Vice President of Gibraltar.

Jerome Nussbaum, Executive Vice President, CFO of GFC and President and COO of Gibraltar Savings.

Michael W. Mooney, Treasurer, Executive Vice President, CFO of Gibraltar Savings.

Lynne Crawford, Senior Vice President and Controller of Gibraltar Savings, Vice President of Gibraltar Management of Properties, Inc. ("GMOP"); officer/Director of Gibraltar affiliates.

Linda K.S. Blount, Vice President-Investor Relations and Corporate Communications of Gibraltar.

Robert R. Sprague, Board member of Gibraltar

Houston I. Flournoy, Board member of Gibraltar.

Bernice Hutter, Board member of Gibraltar.

Melvin P. Spitz, Board member of Gibraltar.

Rafael E. Vega, Board member Of Gibraltar.

Richard M. Post, Senior Vice President-Real Estate of Gibraltar Savings.

James R. Boyle, Executive Vice President-Real Estate Lending of Gibraltar Savings.

Warren P. Glupker, Chief Appraiser of Gibraltar Savings.

Susan Rawlings, CPA, senior financial analyst in charge of accounting for real estate of Gibraltar Savings.

Dean W. Harrison, Senior Vice President, General Counsel and Secretary of Gibraltar Savings.

[6/] Gibson.

advisors[8/]. The class is defined as individuals who purchased GFC securities between January 1, 1986 and April 30, 1989 and all GFC shareholders who received GFC's Proxy Statements dated April 6, 1987 and April 8, 1988. The class representatives are John and Patricia Glavaris ("Glavaris") and Benny Tolley ("Tolley").

Plaintiffs allege that as a result of the actions of their officers and directors, GFC[9/] and its subsidiary, Gibraltar Savings, made false and misleading representations and failed to disclose to the public and to its shareholders material facts affecting GFC securities. Further, GFC's attorneys, accountants, and financial public relations advisors are alleged to have been not only negligent but reckless in the making and issuance of statements and reports concerning GFC. As a result, plaintiffs lost their investments in GFC securities. Since the plaintiffs' allegations cover such a long period of time and are not set forth in chronological order, a history of the events which culminated in the filing of this action is required for an understanding of the problems raised by the Second Amended Complaint.[10/]

[7/] Ernst; Peat, and Kenneth Leventhal & Co. and Richard Sprayregen, partner (dismissed with prejudice from action on July 29, 1991).

[8/] Rifkind.

[9/] As stated, for the most part, plaintiffs' allegations are made against both GFC and Gibraltar Savings, jointly, without differentiating between the two entities.

[10/] The Court has developed a time line which sets forth the key events important to the motions. See Appendix.

A central focus of the events involved here is the "Galleria",[11/] a commercial real estate property located in Metairie, Louisiana which was owned by Gibraltar Management of Properties, Inc. ("GMOP"), a wholly owned subsidiary of Gibraltar Savings. The project manager of the Galleria was Gibraltar Community Builders, Inc. ("GCBI")[12/]." In 1983, GCBI and GMOP formed Gibraltar Community Builders ("GCBI"), a California partnership, to develop real estate properties. In the partnership agreement, GMOP was referred to as the "financial partner" and GCBI as the "developer." By 1985, GFC's largest real estate investment was in GCB, and its largest real estate development project was the Galleria. More than $530 million was invested in GCB and the Galleria.

The events critical to the claims alleged here began in January 1986 when GFC published its 1985 Annual Report stating that the "outlook . . . in 1986 is favorable" and that the company expected continued asset growth and another successful year. The Form 10-K filed with the Securities and Exchange commission ("SEC") at that time stated that

> [Gibraltar's] real estate investments are carried at the lower of cost or net realizable value. Net realizable value is determined quarterly based on estimated sales

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[11/] In fact, the majority of the allegations of wrongdoing by defendants concern fraudulent representations and mismanagement of the Galleria and "other" real estate investments which are not specifically identified in the complaint. For example, in paragraph 76 of the complaint where plaintiffs list "fraudulent and false and misleading omissions," of the 45 subsections, at least 24 concern the Galleria and real estate investments. See Complaint at 90-103.

[12/] The three officers, directors and shareholders of GCBI were: Corey Patick, Hal Lurtsema, and Myron Stahl.

value less estimated expenses and carrying costs through completion and sale of the project. Estimated sales values are based on independent appraisals or comparisons with sales prices of similar properties. Estimates of expenses and carrying costs are based on historical experience adjusted for factors such as anticipated inflation [and] cost of funds.

Ernst audited GFC's 1985 financial statements[13/] and issued an opinion dated January 23, 1986 stating that they conformed with generally accepted accounting principles ("GAAP") applied on a consistent basis.[14/]

Some months later, in August 1986, Glavaris purchased shares of GFC common stock and GFC 9-1/4% convertible subordinated debentures due 2008 ("GFC 9-1/4"). In that same month, Peat replaced Ernst as GFC's auditor. In September 1986, it is alleged that GFC learned that an appraisal of the Galleria would reflect a loss in excess of $30 million. Upon learning of the probable appraisal figure, GFC, through defendant Nussbaum, is said to have cancelled the appraisal and failed to disclose this information about the Galleria. Glavaris made additional purchases of GFC 9-1/4 in October and December 1986.

In January 1987, Tolley purchased GFC 9-1/4 and

[13/] The financial statements are the consolidated statements of GFC and its subsidiaries, including Gibraltar Savings.

[14/] The 1985 financial statements and representations regarding the reporting of real estate also appeared in the April 7, 1986 Prospectus covering the offer and sale of Gibraltar Saving's 7-1/2% Convertible Subordinated Dentures due 2006 ("Gibraltar Savings 7-1/211) and the December 15, 1986 Prospectus covering the offer and sale of GFC's 13-7/8% Senior Subordinated Debentures due 2001 ("GFC 13-7/8").

shortly thereafter, GFC issued its year-end press release which reported "record earnings" for the year ending December 31, 1986 and a "50% dividend increase." Also, the 1986 Annual Report stated that "results for 1986 include provisions for loan losses of $34 million and losses on real estate operations of $33 million. As a result, there will be a substantial reduction in such provisions in 1987 and beyond and a positive effect on operating earnings."

In February 1987, Glavaris purchased additional GFC common stock and GFC 9-1/4. In that month, it is alleged that GFC was informed that a Los Angeles law firm, Dorman and Wheeler, was investigating claims of mismanagement against GFC's officers and directors arising out of the development of the Galleria. In March 1987, GFC issued its 1986 financials with an opinion by Peat stating that the financials conformed with GAAP applied on a consistent basis.[15/] In late February or early March of 1987, Corey Patick, Chief Executive Officer of GCBI, at a meeting at Gibraltar Savings' headquarters, threatened litigation against Gibraltar Savings because of its refusal to contribute the Galleria to GCB.[16/] Robert H. Bretz ("Bretz"), counsel for plaintiffs in this case, was present at

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[15/] Ernst's opinion dated January 23, 1986 was republished and included with the 1986 Annual Report to shareholders and Form 10-K.

[16/] Declaration of Martin C. Washton Filed In opposition to Plaintiff's Second Motion for Partial Summary Judgment in Neubronner v. Young at 17-18 (filed November 5, 1990) (deposition testimony of Dean W. Harrison taken October 20, 1990). These uncontradicted allegations and this testimony are cited for the purpose of examining whether Bretz's representations as to the necessity for discovery should be found persuasive.

that meeting.[17/] By March 1987, litigation had commenced in Metairie, Louisiana concerning the right to control and possession of the Galleria.[18/] On March 13, 1987, an action was filed in Stockton, California by GCBI against GMOP and Gibraltar Savings in which GCBI alleged that the failure of GMOP and Gibraltar Savings to contribute the Galleria to GCB constituted a breach of duty to the partnership. Bretz was counsel for the principal shareholders of GCBI in that case.[19/]

In April 1987, a second version of GFC's 1986 financials was issued and included with the Proxy Statement sent to the shareholders for the 1987 Annual Meeting of Shareholders. This version of the financials treated the Galleria as a long-term investment. At the Annual Meeting, the shareholders were asked to approve a retroactive agreement indemnifying GFC's officers and directors for any claims which might be brought against them for mismanagement, as well as any claims which might arise out of the acquisition of First State Bank of Florida ("FSBF"). The Proxy Statement for the Annual Meeting to be held in may contained a statement that the Board was not aware of any actions currently pending or threatened against any directors or officers of GFC who might become parties to the indemnity agreement. However, plaintiffs allege that the Proxy Statement failed to disclose that the Board was in fact aware of threatened litigation against members of GFC'S management who might become party to the indemnity agreement; there were two versions of the GFC 1986 financial statements; the Galleria and other real estate

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[17/] Id. at 18.

[18/] Id. at 19-20

[19/] Id. at 20-21

investments posed a threat of serious potential losses; and the Federal Home Loan Bank Board ("FHLBB") had voiced objections to acquisitions by GFC[20/] and required the execution of a Capital Maintenance Agreement and a limitation on the amount of dividends from Gibraltar Savings to GFC.

In May 1987, Glavaris purchased additional GFC 9-1/4.On May 14, 1987, a lawsuit was filed in the Central District of California for injunctive relief based on the unlawful solicitation of proxies for the 1987 Annual Meeting. Stahl v. Gibraltar Fin. Corp., No. CV 87-3147. Bretz represented the plaintiff in this lawsuit in which it was alleged that GFC had failed to disclose that a law firm, Dorman and Wheeler, had been investigating claims of mismanagement by GFC's officers and directors involving, among other things, the Galleria, and also that GFC was aware of threatened litigation against officers and directors who were potential beneficiaries of the indemnity agreement.[21/] Despite the filing of the Stahl case, the May 22, 1987 Annual Meeting was held and, at that meeting, Young stated that GFC was in sound financial condition and that its future prospects were favorable. During the summer of 1987, GFC secured the permission of the FHLBB to

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[20/] Plaintiffs allege that as a condition of Gibraltar savings, acquisition of Santa Clara Savings, GFC was required to enter into a Capital Maintenance Agreement with the FHLBB. However, this allegation is not related to the proxy statements, nor are any other facts alleged which indicate any wrongdoing by Gibraltar in connection with this acquisition. Complaint ¶ 76(42) at 102.

[21/] On July 14, 1989, this Court granted judgment for the defendants in Stahl on the ground of lack of standing to sue. On June 18, 1992, the Ninth Circuit reversed this Court's decision.

purchase FSBF for $116 million and Glavaris purchased additional GFC 9-1/4.

In October of 1987, it is alleged that the FHLBB told GFC that it found the institution to be in financial trouble with an unrealized loss of $500 million resulting from its substantial portfolio of fixed rate mortgage-backed securities.[22/] Though the parties may dispute the content of the communications with the FHLBB, they do not dispute that on October 30, 1987, the investment community was shocked by GFC's disclosure of a loss of $154.6 million in the third quarter ending September 30, 1987. This was one of the largest quarterly losses ever announced by a public thrift institution. GFC acknowledged the loss as resulting from commercial banking enterprises and high-risk real estate acquisitions, and stated in its press release:

> GFC has commenced a program to expedite the sale of real estate investments and has provided for anticipated losses on sale. . . This decision . . . required a $147.1 million third quarter writedown.[23/]

GFC suspended its quarterly dividend, its credit rating was lowered and it was forced to put up one of its principal assets, the MoneyCenter, for sale in order to raise capital. On November 2, 1987, The Wall Street Journal[24/] and New

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[22/] Plaintiffs allege that Gibraltar did not take steps to eliminate or reduce its exposure to a rising interest rate environment and thus suffered losses from these investments. This allegation is, at most, a claim of negligence by Gibraltar officials.

[23/] GFC Press Release (October 30, 1987).

[24/] David Hilder, Gibraltar Posts a Big Deficit for 3rd Quarter, Wall St. J., November 2, 1987, § 1, at 13.

York Times[25/] reported the news of these catastrophic losses and the price of GFC stock plummeted. Glavaris purchased common stock in GFC on November 4, 1987, almost immediately after this alarming report.

On November 17, 1987, a stockholders' derivative lawsuit was filed in the Superior Court of the State of California in LOS Angeles County for breach of fiduciary duty and breach of contract against GFC's management and accountants. Weinberger v. Gibraltar Fin, Corp., No.C668149. Further, commencing on November 23, 1987 and at various times thereafter, the following actions were filed in the Central District of California: Model Assocs., Inc.v. Gibraltar Fin, Corp., No. CV 87-7876; Lifshitz v.Gibraltar Fin. Corp., No. CV 87-8156; Winard v. Gibraltar Fin, Corp., No. CV 88-1101; Greenman v. Gibraltar Fin. Corp., No. CV 88-1912; Seidner v. Gibraltar Fin. Corn., No. CV 88-4551. On May 9, 1988, pursuant to stipulation of the parties, these actions were consolidated under the caption In re Gibraltar Fin. Corp. sec, Litig., Master File No. CV 87-7876 MRP (Bx). A Second Consolidated Amended and Supplemental Complaint was filed on May 1, 1989 which defined the class period as January 23, 1986 through March 31, 1989.[26/] Each of these lawsuits alleged

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[25/] Gibraltar Loss of $155 Million, N.Y. Times, November 2, 1987, at B1O.

[26/] The end date for the class period was extended from November 1, 1987 to March 31, 1989 based upon new allegations raised in the Second Amended Complaint, including that (1) additional losses from all of the activities previously disclosed had continued for each quarter through March 31, 1989, and (2) previously unidentified bond market investments led to losses commencing in the third quarter of 1987 for which defendants did not make timely and adequate disclosures.

misrepresentations and omissions by GFC, its officers and directors, as well as its accountants, regarding GFC's 1985 and 1986 financial reports and its real estate investments. The gravamen of the various claims against the defendants was that they had failed to make adequate provisions for losses and timely write-downs of commercial loans, real estate and bond investments; failed to make adequate provision for losses and timely write-down of loans and properties acquired in settlement of loans to their realizable value; and failed to timely and adequately disclose losses and the risky nature of GFC's investments.[27/]

By the end of 1987, plaintiffs allege that GFC suffered unreported losses attributable to the decline in market value of its portfolio of fixed rate mortgage-backed securities in excess of $300 million and that at that point its net worth consisted primarily of intangible good will. It is further alleged that in December 1987, GFC's management met with the FHLBB to discuss the FHLBB's concerns about the financial condition of the company, but that nevertheless, in January 1988, GFC issued a press release stating that it was in sound condition, that capital ratios of its savings and loan subsidiaries remained in excess of regulatory requirements, and that 1988 should be a profitable year.

In March 1988, Young, Williamson and Nussbaum retired, although plaintiffs allege that in fact these individuals were fired. Further, in that month, the 1987 GFC financial statements were issued with an opinion from

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[27/] On June 23, 1989, this Court certified a plaintiff Settlement Class solely for purposes of the stipulation, the settlement contained therein and judgment on July 28, 1989, John G. Glavaris filed a timely request for exclusion from the settlement class. Tolley did not file a request for exclusion. The settlement and final judgment of the action was entered on September 19, 1989.

Peat stating that they conformed with GAAP applied on a consistent basis. Plaintiffs allege no specific fraud with respect to these financials. At that time, GFC closed the MoneyCenter necessitating a $20 million write-off.

In April 1988, a Proxy Statement was sent to all shareholders. Plaintiffs allege that the statement did not disclose the claims brought against GFC'S management, the FHLBB criticisms of GFC's management, and the FHLBB's concerns with respect to the financial well-being of GFC.[28/] In May 1988, at the Annual Meeting, Thayer reported that GFC's condition had stabilized, no additional major surprises were expected, and GFC expected to make a profit by the fourth quarter of 1988. A Notice of Settlement, dated August 12, 1988 and issued by Gibson on behalf of the Special Committee,[29/] reported that the committee had not found any evidence of wrongdoing on the part of GFC's management. GFC settled the Weinberger shareholder derivative suit in September 1988.

By January 1989, GFC was publicly reported to be in an "unsafe and unsound" condition. The 1988 financial reports, issued in March 1989, showed a loss of $101 million. On March 10, 1989, the Mercatura Trust[30/] filed

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[28/] Plaintiffs allege no specific vote which was affected by these alleged omissions in the 1988 Proxy Statement.

[29/] This committee was established by Gibraltar to investigate the allegations of the Weinberger derivative action.

[30/] Neubronner is the trustee of the trust.

an action against Drexel Burnham Lambert.[31/] Mercatura Trust v.Drexel Burnham Lambert Inc., No. CV 89-1461. Bretz again represented the plaintiff in this action. In Mercatura Trust, plaintiff alleged insider trading based on non-public information concerning the Galleria. The period of insider trading was alleged to have ended on October 30, 1987 when GFC reported the real estate investment and loan losses of a quarter billion dollars.[32/] Plaintiff alleged in the Mercatura Trust case that after October 30, 1987 the inside information was "out." on March 30, 1989 the FSLIC was appointed conservator of Gibraltar Savings. Plaintiffs allege that GFC continued to deny any wrongdoing, even in the face of this action by the FSLIC. In April 1989, Gibson reconfirmed what was stated in the Notice of Settlement of Weinberger,

that the Special Committee found no wrongdoing by GFC's officers and directors.

[31/] In the current complaint, plaintiffs allege that Gibraltar Savings had purchased a substantial portfolio of "junk" bonds from Drexel Burnham Lambert and that one or more of Gibraltar's executives had received undisclosed compensation from these. Complaint ¶ 76(37) at 101. There are no facts pleaded to support this allegation. Furthermore, such an allegation, along with plaintiffs' general allegations of mismanagement, are derivative in nature since they result in injury to the corporation and therefore must be brought in the name of the corporation. See Stevens v. Lowder, 643 F.2d 1078, 1079-80 (5th Cir. 1981). Any relief based upon such alleged wrongdoing belongs to the RTC and thus, plaintiffs do not have standing in this action to assert such claims. See Leach v. FDIC, 860 P.2d 1266, 1269 (5th Cir. 1988), cert. denied, 491 U.S. 905 (1989).

[32/] Mercatura Trust Complaint at 7 1 24.

On June 2, 1989, another lawsuit was filed in the Central District against GFC and its officers, directors and accountants, among others, alleging violations of the federal securities laws and RICO, together with several supplemental state claims based on misrepresentations and omissions, as well as mismanagement by GFC and its officers, directors and accountants for the period January 1, 1986 through April 1, 1989. Neubronner, as Trustee for and on behalf of Mercatura Trust v. Young, No. CV 89-3377. In this lawsuit, Bretz, as attorney f or Neubronner[33/], characterized the October 30, 1987 losses reported by GFC as "catastrophic operating losses of approximately $250,000,000 (one quarter of a billion dollars!) attributable to the Company's prior real estate loan and investment activities. The Company's stock price dropped to approximately $3.[34/] Bretz further alleged that "management was aware of massive losses attributable to the Company's real estate loan and investment activities and portfolios aggregating approximately $250,000,000- which catastrophic and terminal losses were first Publicly reported on or about November 3, 1987 (based on GFC Managements' Press Release dated Friday October 30, 1987.[35/] (Emphasis added throughout.) As Neubronner himself stated in a declaration filed in the case:

> Mercatura Trust was still purchasing shares of GFC Common Stock, and had accumulated a position of approximately 1,028,000 shares of GFC Common Stock, in early November of 1987 when I personally first heard about GFC's horrible real estate losses of about U.S.

[33/] Neubronner was the largest single shareholder of GFC

[34/] Neubronner Complaint at ¶ 6.

[35/] Neubronner Complaint ¶ 31 (11) at 41-42 (emphasis added).

> $250,000,000 as announced by GFC and Gibraltar Savings in the U.S. on or about October 30, 1987.
>
> I immediately caused Mercatura Trust to stop purchasing GFC stock after I first learned about these very large losses attributable to Gibraltar Savings' commercial and real estate investments.[36/]

The complaint in Neubronner also recited that "[i]n January of 1989, the Federal Home Loan Bank Board of San Francisco declared GFC to be in an 'unsafe and unsound' condition and effectively seized control and management of the Company's savings and loan business. . . . [By] April 3, 1989, the Wall Street Journal reported that the Government's takeover of Gibraltar confirms that GFC's shareholders have been 'wiped out'!"[37/]

A short time after the Neubronner case was filed, additional cases were brought in the Central District against GFC, Gibraltar Savings and related entities alleged to be involved in various ways in the Gibraltar losses. These cases include Neubronner v. Waldrop, No. CV 89-3529, and Gibraltar v FHLBB, No. CV 89-3489, both before Judge Keller in the Central District. These cases challenged the FSLIC's conservatorship of Gibraltar Savings and Gibraltar Savings Bank as unlawful. Bretz represented the plaintiffs in

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[36/] Declaration of Plaintiff D. Neubronner in Support of Notion for summary Judgment Against Gibraltar Savings and GFC officer/Director Defendants in Neubronner v. Young, at 5 (October 10, 1990).

[37/] Neubronner Complaint 7 at ¶¶ 13, 15.

each of these actions as well.[38/]

After these lawsuits were on file, on June 30, 1989, Glavaris purchased GPC 13-7/8.[39/] On July 28, 1989, Glavaris filed a request for exclusion from the settlement in the In re Gibraltar class action indicating that he was prepared to file his own action against GFC and its officers, directors and others. The In re Gibraltar action was settled and final judgment entered on September 19, 1989. On November 16, 1990, more than a year after Glavaris opted out of the In re Gibraltar class, this class action was filed

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[38/] Plaintiff Neubronner, through his attorney, Bretz, has made many inconsistent allegations concerning the condition of Gibraltar Savings in these various actions. For example, in Neubronner v. Young, plaintiff alleges that Gibraltar was in an unsafe and unsound condition allegedly due to the fraudulent mismanagement of Gibraltar. Many of the same allegations are raised in this action. However, in Neubronner v. Waldrop, plaintiff alleges that although the "reason stated for the seizure . . . of Gibraltar Savings and Gibraltar Savings Bank by the government was . . . that Association[s] had incurred substantial dissipation of its assets and earnings due to violations of law, rules, regulations and to unsafe and unsound practices and is in an unsafe and unsound condition to transact business," the Associations are "not in an unsafe and unsound condition to transact business." Waldron Complaint 2-3 at ¶ 3, 4-5 at ¶¶8-9 (emphasis added). In fact, plaintiff alleges in Waldrop that "the seizure of . . . (the Associations) by the government agencies was unlawful." Waldrop complaint, 6 at ¶ 14.

[39/] Neither Glavaris nor Tolley purchased Gibraltar Savings securities during the class period; they only purchased GFC securities. Moreover, this purchase is outside the class period which ends on April 30, 1989.

with Glavaris and Tolley as class representatives and Bretz as the attorney for the class.

As this brief chronology demonstrates, litigation involving GFC's affairs has been going on for a long time, and GFC's investment in the Galleria has been a central focus, in one way or another, of most of that litigation. As the chronology also shows, Bretz has been intimately involved in litigation arising out of these problems since early 1987, and his involvement with GFC began with a controversy over the Galleria. Therefore, the protestations he has made concerning his inability to plead a coherent actual theory because of a lack of discovery must be viewed with some degree of skepticism by the Court.

II. FEDERAL SECURITIES VIOLATIONS

A. Section 10(b) Claim

To state a claim under § 10(b), a plaintiff must allege that in connection with the purchase or sale of a security, the defendant, acting with scienter, made a false material representation or omitted to disclose material information that defendant owed a duty to plaintiff to disclose, upon which plaintiff relied and which caused plaintiff injury. Cox v. Eichler, 765 F. Supp. 601 (N.D. Cal. 1990).[40/]

[40/] Section 10(b) of the Securities Exchange Act of 1934 U.S.C. § 78j(b) provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . (b) To use or employ, in connection with the purchase or sale of any security registered on a

1. Analysis of fraud On the market theory

It is obvious that the effect on this case of prior litigation of the magnitude outlined above poses a serious problem of analysis for the Court. This problem is exacerbated by the way in which the plaintiffs have framed the pleading now before the Court. The prerequisites for the establishment of a class action are that "there are questions of law or fact common to the class" and "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a). Thus, the class period in an action based on § 10(b) must be framed in such a way that all members of the class are similarly situated with respect to the misrepresentations or

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> national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule lOb-5 of the Securities Exchange Commission, 17 C.F.R. § 240.10b-5, provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

omissions alleged. This requirement of commonality becomes most critical when applied to the element of reliance. Here, plaintiffs have sought to carry their burden of proving reliance by alleging that the misrepresentations and omissions claimed constituted a "fraud on the market."

The fraud on the market theory was first accepted by the Ninth Circuit in Blackie v. Barrack, 524 F.2d 891 (9th Cir. 1975), cert. denied, 429 U.S. 816 (1976). The "theory is based on two assumptions: first, that in an efficient market, the price of the stock will reflect all information available to the public, and second, that an individual relies on the integrity of the market price when dealing in that stock." Levinson v. Basic Inc., 786 F.2d 741, 750 (6th Cir. 1986), vacated on other grounds, 485 U.S. 224 (1988) (citations omitted). Thus, if the market is deprived of material information or if the market reflects misstatements or omissions of material information, the integrity of the market is compromised and the market price is artificially inflated or deflated. Id. The theory then assumes that an investor trading in the market is relying on its integrity and therefore indirectly relying on the material misrepresentation or omission then affecting the market price. In a § 10(b) case then, a rebuttable presumption is created[41/] that the

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[41/] The defendants may rebut the presumption created in a number of ways including a showing "that an individual plaintiff purchased despite knowledge of the falsity of a representation, or that he would have, had he known of it. "Blackie, 524 F.2d at 906. Looking at the history of Glavaris trading in GFC securities, one could conclude that Glavaris, in fact, was not relying on the publicly available information reflected in the market price. Glavaris purchased GFC securities only days after the announcement of GFC's catastrophic losses and three months after the Gibraltar Savings was placed in conservatorship.

plaintiff relied on the material misrepresentation or omission and proof of individual reliance is not required to establish a prima facie case. Id. See also Basic, Inc. v. Levinson, 485 U.S. 224 (1988); In re Convergent Technologies Sec. Litig., 948 F.2d 507, 512 n.2 (9th Cir. 1991).[42/]

This presumption of reliance is based on the notion that "'the market is interposed between seller and buyer and, ideally, transmits information to the investor in the processed form of market price. . . . The market is acting as the unpaid

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[42/] With regard to proof of reliance based on a fraud on the market theory, the Ninth Circuit has chosen not to distinguish between a misrepresentation and an omission. In Little v. First California Co., 532 F.2d 1302 (9th Cir. 1976), the Ninth Circuit commented that

> [t]he categories of 'omission' and misrepresentation' are not mutually exclusive. All misrepresentations are also nondisclosures, at least to the extent that there is a failure to disclose which facts in the representation are not true. Thus, the failure to report an expense item on an income statement, when such a failure is material . . . can be characterized as (a) an omission of a material expense item, (b) a misrepresentation of income, (c) or both.

Particularly when multiple misrepresentations and omissions are intertwined, as they are here, the task of differentiation is both difficult and unnecessary. As the Third Circuit in Sharp v. Coopers & Lybrand, 649 F.2d 175, 188 (3d Cir. 1981), cert. denied, 455 U.S. 938 (1982), stated

> (a) strict application of the omission-misrepresentations dichotomy would require the trial judge to instruct the jury to presume reliance with regard to the omitted facts, and not presume reliance with regard to the misrepresented facts. Although this resolution would have great appeal to graduate logicians in a classroom, we are not persuaded to adopt it for use in a courtroom.

agent of the investor, informing him that given all the information available to it, the value of the stock is worth the market price.' . . . An investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price.', Basic, Inc., 485 U.S. at 244, 247 (quoting In re LTV Sec. Litig., 88 F.R.D. 134, 143 (N.D. Tex. 1980) (emphasis added)). Thus, the investor is indirectly relying on all of the publicly available information which is then reflected in that market price. Once the truth is publicly disclosed, the truth is reflected in the market price in the same manner the misrepresentations were reflected in the price before the truth was revealed. Since an investor who buys or sells relying on the market price after the disclosure is relying on true information, he can no longer claim reliance on the previous misrepresentations or omissions.

The class period here, as defined--January 1, 1986 through April 30, 1989--is exceptionally long for a § 10(b) claim based on a fraud on the market theory. An impersonal,well-developed securities market is constantly being supplied with information concerning public companies, and, given the requirements of reporting and disclosure imposed on these companies, it is difficult to imagine a situation where the same fraud could affect all buyers of a publicly traded security in a three year period. Nevertheless, the complaint in this case attempts to claim a kind of "floating fraud", one alleged to have been perpetuated by the inadequacy of each and every disclosure made by GFC over a three year period of time. Put simply, the plaintiffs' theory is that no disclosure made by GFC was sufficient to correct the effect on the market of any past fraud over the entire three year period. This kind of

renders analysis of time sensitive issues like the statute of limitations, causation and reliance difficult, if not impossible. Although this Court is also highly critical of this pleading technique, plaintiffs have used it here and the Court is therefore forced to make its analysis of these time-sensitive issues on the assumption that a three-year fraud on the market theory is viable.

Three inquiries must be made in analyzing the time sensitive issues in a § 10(b) claim based on fraud on the market: (1) when did the plaintiffs buy or sell the securities; (2) what were the misrepresentations or omissions alleged to have constituted the fraud on the market at that time; and (3) when was there a disclosure of facts--from whatever source--sufficient to correct the effect on the market of the-fraud created by those particular misrepresentations or omissions? The answer to the third inquiry sets the date on which plaintiffs are deemed to be on notice that they have traded in a market tainted by the particular misrepresentations or omissions alleged to be fraudulent. It also sets the date after which no market participant can claim to have relied on these particular fraudulent misrepresentations or omissions in entering into a transaction.

In making the requisite inquiries in this case, two dates are obviously the most significant: November 3, 1987,

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According to plaintiff's theory, the SEC investigation and suit never exposed the root of Home-Stake's fraudulent operation. They claimed further the resulting Settlement and Rescission offer not only incorporated the continuing fraud but also clothed subsequent activities in the mantle of legitimacy. Anixter v. Home-Stake Production Co., 939 F.2d 1420, 1431 (loth Cir. 1991), cert. granted sub nom., Dennier v. Trippet, 112 S. Ct. 1658 (1992) (judgment vacated and case remanded for further consideration in light of section 27 of the 1934 Act).

In making the requisite inquiries in this case, two dates are obviously the most significant: November 3, 1987, when the financial press responded in shock to the October 30, 1987 announcement of GFC's catastrophic losses, and April 3, 1989, when the public announcement had been made of the March 30, 1989 appointment of the FSLIC as conservator for Gibraltar Savings. These two dates were of such overwhelming significance to the market for GFC securities that it is impossible to understand this or any other case involving GFC securities without reference to them. Thus, there are three relevant periods of time for the alleged class members in this case: Period 1--January 1, 1986 (when the class begins) through November 3, 1987 (when the catastrophic losses had been fully publicized); Period 2--November 4, 1987 through April 3, 1989 (when the takeover of Gibraltar Savings by the FSLIC had been fully publicized'; and Period 3--April 4, 1989 through November 16, 1990.[44/] Using the fraud on the market theory, the three relevant inquiries for each of these three periods must be analyzed in the following way:

a. Period 1: January 1, 1986 through November 3, 1987

i. Who bought GFC securities?

Glavaris and Tolley purchased GFC securities in this period.

ii. What was the alleged fraud on

[44/] For purposes of analysis, the Court has extended the class closing date of April 30, 1989 to the date of the filing of this action in order to cover the period in which plaintiff allege transactions in GFC securities.

ii. What was the alleged fraud on the market?

(a) GFC represented that its general condition and outlook was positive when in fact the company was unsound. It also misrepresented that there were record earnings for year-end 1986.

(b) In its 1985 and 1986 financial statements, GFC misrepresented the method by which its real estate investments were treated. It also failed to disclose that it had cancelled one appraisal of the Galleria and that no other appraisals had been sought or obtained.

(c) GFC and its accountants represented that GFC's 1985 and 1986 financial statements conformed with GAAP, when they did not.[45/]

(d) GFC reported that the October 30, 1987 losses were incurred in the third quarter of 1987 when in fact they were incurred over the previous two years. [46/]

[45/] This general allegation is not sufficiently specific to state a claim for securities fraud under Rule 9(b). The allegation of fraud must indicate what item of the financials did not conform with GAAP and why. Schneider v. Traweek, 1990 WL 169856 (C.D. Cal. 1990) (plaintiff may not recite laundry list of various reporting standards and then allege all were violated). The only allegations which are sufficiently specific relate to the representations as to the Galleria and other real estate investments referred to in the 1985 and 1986 financials

[46/] This supposed misrepresentation is immaterial. Although plaintiffs argue that even this disclosure was a misrepresentation because the losses actually occurred between 1985 and September 1987 and Young stated that GFC was stronger for writing off the loss

iii. When was there a public disclosure sufficient to correct the effect of that fraud on the market?

Between October 30, 1987 and November 3, 1987, GFC publicly disclosed massive losses for the third quarter of 1987 and suspended dividends, both as a result of real estate investments and commercial banking enterprises. Further, the price of GFC stock plummeted. These events were reported throughout the country. There can be no doubt that these reports placed any reasonable person on notice of potential fraud in the earlier statements made concerning its real estate investments and the general outlook for the company. It is obvious that if these reports did not totally destroy the market in GFC securities, they quite clearly corrected any falsely affirmative affect created by the earlier statements made by the company. In fact, in plaintiff's motion for partial summary judgment in Neubronner v. Young, plaintiff argued that an action under § 10(b) had been established against Gibraltar, its management and accountants because plaintiff had purchased stock in Gibraltar [d]uring the period following such [false] statements (January 21, 1987) and the time the truth was ultimately revealed (October 30, 1987).[47/] (Emphasis added.)

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and it would not happen again, these two "facts" are immaterial. In Bretz's own words, the loss reported on October 30, 1987 was "catastrophic" and regardless of any inaccuracies in the disclosure, it was certainly sufficient to place a reasonable person on notice of prior misrepresentations as to these same subjects.

[47/] Plaintiff's Motion for Partial Summary Judgment Against Young and GFC for Section 10(b) Cause of Action in Neubronner v. Young, at 23 (filed Feb. 13, 1990) (emphasis added). See also Plaintiff's Reply to Defendant Young's Opposition to Plaintiff's

Certainly, as to any actionable fraud alleged during period 1, the market had received sufficient information by November 3, 1987 to place participants in it on notice of the past fraud and to dissipate whatever affirmative effect that fraud had on the market. At the very least, it is safe to say that anyone trading in GFC securities after 20 November 3, 1987 was not trading in the same market as the one that existed prior to that date, nor was any trade made on the same market information.

b. Period 2: November 4, 1987 through April 3, 1989

i. Who bought GFC securities?

Although plaintiffs' counsel has stated that he has other representative plaintiffs who bought GFC securities throughout the class period available to be joined in this case, Glavaris and Tolley purchased no GFC securities in this period.

ii. What was the alleged fraud on the market?

(a) GFC represented that its general condition was sound when in fact it was not. It also misrepresented that the capital ratios of GFC's savings and loan subsidiaries remained in excess of regulatory

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Motion for Partial Summary Judgment in Neubronner v. Young, at 13 (filed May 1, 1990) ("In October of 1987 Gibraltar Savings received the Dupree Felts appraisal on the Galleria (dated October 1, 1987) and provided a copy to the FHLBB. . . . October 30, 1987, GFC publicly reported losses attributable to GFC and Gibraltar Savings' commercial real estate loans and investments . . . . 11) (emphasis added).

requirements, that GFC's condition had stabilized and that there were no major surprises expected.

(b) GFC and its accountants represented that GFC's 1987 financial statements conformed with GAAP, when in fact they did not.[48/]

(c) On November 11, 1987, GFC announced its plans to sell-the MoneyCenter, however, it ultimately wrote off the MoneyCenter for $20 million.[49/]

(d) GFC failed to disclose that by the end of 1987, it had suffered unreported losses attributable to the decline in market value of Gibraltar's portfolio of fixed rate mortgage-backed securities in excess of $300 million.

(e) Gibson represented that the Special Investigative Committee found no wrongdoing by GFC management.[50]

[48/] This general allegation is not sufficiently specific to state a claim for securities fraud under Rule 9(b). &U surra note 45.

[49/] This allegation does not allege facts which indicate that this statement was fraudulent. That Gibraltar ultimately had to write off the MoneyCenter, several months later, does not establish an inference that at the time this statement was made it was false.

[50/] There are no facts pleaded to demonstrate that the statements were in fact false. Plaintiff does not allege that the Special Investigative Committee found wrongdoing by Gibraltar management and failed to report it.

iii. When was there a public disclosure sufficient to correct the effect of that fraud on the Market?

In the period from January, 1989 through April 3, 1989, Gibraltar was publicly reported to be in unsound financial condition, losses of $101 million for 1988 were announced, and on March 30, 1989, the FSLIC was appointed conservator of Gibraltar. Thus, as to any fraud alleged during period 2, the market had received sufficient 22 information by April 3, 1989 to place participants in it on notice of the alleged past fraud and to dissipate any affirmative effect that fraud had on the market. In any event, the market after April 3, 1989 certainly was not the same market as the one that existed prior to this date.

c. Period 3: April 4, 1989 through November 16, 1990

i. Who bought GFC securities

Glavaris purchased GFC stock after the class period ends on April 30, 1989.

ii. What was the alleged fraud on the market?

Gibson reasserted the same statement it made in September of 1988 that the Special Committee found no wrongdoing by GFC management.[51/]

[51/] See supra, note 50.

iii. When was there a public disclosure sufficient to correct the effect of that fraud on the market?

The fraud alleged in this period is simply the repetition by Gibson of its prior statements from September 1988 rather than any new misrepresentation or omission. Assuming the truth of these allegations, this fraud was the subject of public disclosure in period 2. Thus, its impact on the market is immaterial. By the beginning of period 3, anyone trading in GFC securities had already been advised of the collapse of the company and, presumably, the investors in the market knew that someone had to be responsible for it.

d. Summary analysis of reliance on fraud on the market theory

Without analyzing the precise state of the market on any one given day, several conclusions can be drawn from the prior discussion. The first is that · plaintiffs who purchased GFC securities in period 1 can claim reliance on fraud existent in the market in period I only. In this period, there are representative plaintiffs who bought, there is fraud alleged and, giving plaintiffs the best of the argument, the market affected by the fraud was not fully corrected until November 3, 1987. Next, plaintiffs who purchased GFC securities in period 2 can claim reliance on fraud existent in the market in period 2 only. However, in this period, no plaintiff bought and there is therefore no class representative who can be said to have relied on any fraud then existent in the market. Perhaps some other plaintiff might be in a different position, but there is no such plaintiff in this case at the 22 present time. Finally, plaintiffs who purchased GFC securities in period 3 can claim reliance on fraud existent 24

in the market in period 3 only. However, the fraud alleged 25 in this period is merely a reassertion of a statement to which the market had already reacted in period 2, the effect 27 of which had been dissipated by the end of that period. 28 Anyone buying after the FSLIC took over Gibraltar Savings can hardly have been buying in a market newly tainted by 3 Gibson's fraudulent reassertion of its prior opinion. The reassertion is simply immaterial since plaintiffs have alleged no actionable fraud in period 3, plaintiffs can claim no reliance on fraud in period 3.

2. Causation

The "in connection with" language of § 10(b) is the basis for the requirement of causation in a claim under the section. A transactional nexus must be established between a specific purchase or sale of a security and the alleged fraud. Raschio v. Sinclair, 486 F.2d 1029 (9th Cir. 1973); see also Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 754-55 (1975).

Among the factors to be considered in analyzing the "in connection with" requirement are "the degree of proximity between the securities transaction and the claimed fraud" and "whether there was a causal connection between the fraud and the securities transaction." In re Financial Corp. of America Shareholder Litig., 796 F.2d 1126, 1130 n.4 (9th Cir. 1986) (citing Buffo v. Graddick, 742 F.2d 592, 596 (11th Cir. 1984)). Plaintiff must establish that the fraud caused the plaintiff to engage in the transaction (transaction causation) and that the fraud caused the economic harm (loss causation). Id. at 1130 (citing Bennett v. United States Trust Co., 770 F.2d 308, 313 (2d Cir. 27 1985), cert. denied, 474 U.S. 1058 (1986)). Obviously then, the fraud must have actually occurred before the transaction so that it can be said to have affected the market in which the transaction was effectuated.

effectuated. Proof of fraud occurring after the plaintiff's transaction will not satisfy the "in connection with" requirement.

a. Transaction causation

To establish transaction causation plaintiffs must show that the fraud caused them to enter into the particular transactions involving GFC securities. In fact, "(transaction causation) is another way of describing reliance." Harris v. Union Elec. Co., 787 F.2d 355, 366 (8th Cir.1986), cert. denied, 479 U.S. 823 (1986); see also Basic, Inc., 485 U.S. at 243 ("Reliance provides the requisite causal connection between defendant's misrepresentations and a plaintiff's injury."). As discussed above, the "fraud on the market theory rests on the assumption that there is a nearly perfect market in information, and that the market price of stock reacts to and reflects the available information." Peil V. Speiser, 806 F.2d 1154, 1161 n.10 (3d Cir. 1986). The theory is that the investor is indirectly relying on the publicly available information which is reflected in that market price. Once the fraud is disclosed publicly, the market "reacts to and reflects" the true information and investors purchasing after the disclosure can no longer claim that the fraud caused them to purchase the securities. See Basic, Inc., 485 U.S. at 249 ("[I]f, despite petitioners' allegedly fraudulent attempts to manipulate market price, news of the merger discussions credibly entered the market and dissipated the effects of the misstatements, those who traded Basic shares after corrective statements would have no direct or indirect connection with the fraud.). Thus, the fraud must not only have before the Plaintiffs transaction, it also must not have been before the transaction. Plaintiffs in this case can establish no transaction causation as to fraud disclosed before they purchased the GFC securities.

b. Loss causation

To establish loss causation, plaintiffs must show that the fraud caused the economic harm they suffered. "Put simply, loss causation requires that the is 'damages [of the plaintiff] must be the direct result of the misrepresentations or omissions.'" In re Fortune Sys. Sec. Litig., 680 F. Supp. 1360, 1365 (N.D. Cal. 1987) (quoting In re Washington Public Power Supply Sys., 650 F. Supp. 1346, 1353 (W.D. Wash. 1986)). This element is satisfied "only if the misrepresentation [or omission] touches upon the reasons for the investment's decline." Id. (quoting Huddleson v. Herman & Maclean, 640 F.2d 534, 549 (5th Cir. 1981)). Intervening causes may thus break the chain of causation. Id. In this case, the loss causation chain is broken once the truth is publicly revealed. Thus, if plaintiffs purchased Gibraltar stock after the disclosure of the truth, the fraud is too attenuated to the purchase. Although there may well have been fraud, it cannot have had any effect on plaintiffs' transactions because the price of the securities already would have been adjusted to take account of the disclosure of the truth.

To establish loss causation, plaintiffs must demonstrate that they purchased the securities after the alleged fraud and before the disclosure of the truth, at a time when the price of GFC securities was inflated as a result of the fraud, that the truth was later disclosed, and that, as a result, the price of the securities dropped, causing then economic loss. Plaintiffs in this case can establish no loss causation as to any fraud disclosed before they purchased GFC securities.

c. Summary of causation

The requirements of loss and transaction causation each period can be analyzed as follows: Plaintiffs who purchased GFC securities in period 1 can claim causation with respect to fraud existent in the market in period 1 only. In this period, there are representative plaintiffs who bought GFC securities, there is fraud alleged and, giving plaintiffs the best of it, the fraud continued to affect the market until November 3, 1987 when the truth was disclosed. Plaintiffs who purchased GFC securities in period 2 can claim causation with respect to fraud existent in the market in period 2 only. However, in this period, no class representative bought GFC securities and, as a consequence, there is no plaintiff who could establish that fraud then existent in the market caused that plaintiff either to enter into a transaction or sustain a loss. Perhaps some other potential plaintiff might be in a different position but no such class representative is in the case now. Plaintiffs who purchased GFC securities in period 3 can claim causation with respect to fraud existent in the market in period 3 only. However, the fraud alleged 8 in this period is merely a reassertion of statements to which the market had already reacted in period 2. The effect of these statements had been dissipated by the disclosure of the truth occurring by the end of that period. Anyone buying GFC securities after the FSLIC took over Gibraltar Savings can hardly have been buying in a market newly tainted by Gibson's fraudulent reassertion of its prior opinion. As stated, the reassertion is simply immaterial. Since plaintiffs have alleged no fraud other than the reassertion in period 3, no causation can be established as to this period either.

3. Statute of limitations

In October 1991, all defendants argued in their motions to dismiss that the statute of limitations for federal securities fraud as defined in Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S. Ct. 2773 (1991), and applied retroactively pursuant to James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439 (1991), controlled this action and that plaintiffs' federal securities claims were therefore time-barred. Earlier, the Court had indicated its agreement with this position. However, Public law No. 102-242, which became effective on December 20, 1991, included a provision which amended the Securities Exchange Act of 1934 ("the 1934 Act") by adding a new Section 27A following Section 27, U.S.C. § 78aa. This new section provides, in part, as follows:

> The limitations period for any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.[52/]

Since this action was filed in 1990, Lampf does not apply. Therefore, the limitations period defined in the Ninth Circuit as applicable to § 10(b) claims prior to Lampf controls.[53/]

[52/] Pub. L. No. 102-242 , sec. 476, 105 Stat. 2236 (1991).

[53/] Recently, Judge Legge in the Northern District of California held that Section 27A is unconstitutional on the grounds that it "violates the constitutional separation of powers between the judicial and legislative branches." In re Brichard See. Litig., No. C-87-2987-CAL at I (Mar. 27, 1992). To summarize that decision, the court found that with respect to Lampf, section 27A(a) "direct[s] the

Prior to Lampf, the Ninth Circuit borrowed California's three-year statute of limitations for fraud, Cal. Civ. Proc. Code § 338 (d)[54/], in actions based on § 10(b) Davis v. Birr, Wilson & Co., 839 F.2d 1369, 1369-70 (9th Cir. 1988). "Although state law governs the length of the limitations period, federal law controls the point at which the statute commences to run." Volk v. D.A. Davidson & Co., 816 F.2d 1406 (9th Cir. 1987) (citing SEC v. Seaboard Corp., 677 F.2d 1301, 1309 (9th Cir. 1982)). "The statute of limitations begins to run when the plaintiff has actual knowledge of the fraud or knowledge of facts sufficient to put a reasonable person on notice." Davis, 839 F.2d at 1370. The time of accrual for the limitations period here is dependent upon when the truth regarding the particular fraudulent misrepresentation or omission was publicly disclosed such that a reasonable person would be on notice of the alleged fraud. Recently, the Ninth Circuit in Nevada Power Co. v. Monsanto Co., 955 F.2d 1304 (9th Cir. 1992), reiterated that "when the plaintiff discovered or should have discovered the fraud with the exercise of reasonable

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adjudicative process without changing (the) substantive or procedural rule" announced in Lampf, Id. at 17; and section 27(A)(b) further "upset[s) the final judgments of either the Supreme Court or the lower federal courts" in contravention of the constitution. Id. at 20. Moreover, with respect to Beam, section 27(A) changes the constitutional decision on retroactivity announced in Beam, thus contravening the Supreme Court's judgment on questions of constitutional interpretation." Id. at 31. Without expressing an opinion on this recent decision, this Court declines to decide this action based upon the unconstitutionality of section 27A.

[54/] Cal. Code Civ. Proc. 338(d) states that "[a]" action for relief on the ground of fraud (must be brought within three years.] The cause of action in that case is not deemed to have accrued until discovery, by the aggrieved party, of the facts constituting fraud or mistake."

diligence . . . is usually a question for the trier of fact." Id. at 1308 (quoting General Bedding Corp. v. Echeyarria, 947 F.2d 1395, 1397 n.2 (9th Cir. 1991). Nevertheless, "[r]easonable diligence is tested by an objective standard, [citation omitted] and when uncontroverted evidence irrefutably demonstrates plaintiff discovered or should have discovered the fraudulent conduct, the issue may be decided on summary judgment." Davis, 839 F.2d at 1370 (quoting Kramas v. Security Gas & oil, Inc., 672 F.2d 766, 770 (9th Cir.), cert. denied, 459 U.S. 1035 (1982); accord Mosesian v. Peat, Marwick, Mitchell & Co., 727 F.2d 873, 877 (9th Cir.), cert. denied, 469 U.S. 932 · (1984).

Viewing the uncontroverted facts of the case against the plaintiffs' theory of it, the Court concludes that there is "uncontroverted evidence [which] irrefutably demonstrates plaintiff discovered or should have discovered the fraudulent conduct" within clearly definable time frames. Following the analysis set out above, the statute of limitations on the §10(b) claim based on the fraud alleged in period 1 started to run no later than November 3, 1987, when Gibraltar's catastrophic losses were publicly 19 announced. This action was filed on November 16, 1990, more than three years later. Thus, the § 10(b) claim arising from fraud alleged in period 1 is time-barred.[55/]

A reasonable person would have been on notice of the fraud alleged in period 2 no later than April 3, 1989, when the public announcement of the appointment of the FSLIC as conservator for Gibraltar was made. Thus, the statute of limitations on the § 10(b)-claim based on fraud in

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[55/] The three-year statute of limitations applies as well to the common law fraud claim. Cal. Code Civ. P. § 338(d). Thus, to the extent the state law fraud claim arises from fraud alleged to have occurred during period 1, it is time-barred.

period 2 started to run on that date. Since both December 1987, the time when the period 2 fraud is alleged to have commenced, and April 3, 1989, the date on which a reasonable person would have been on notice of that fraud, are within the three years preceding November 16, 1990, the § 10(b) claim for fraud alleged during period 2 is not time-barred. to Similarly, any § 10(b) claim for fraud alleged during period 3 is also not time-barred.

4. Conclusion: All 10(b) claims must be dismissed

No representative plaintiff has stated a viable claim under § 10(b). Period 1 purchasers of GFC securities can show reliance and causation with respect to the fraud alleged in period 1 only. However, since the claims are time-barred, the § 10(b) claims of purchasers of GFC securities in period I are not viable. Period 2 purchasers can show reliance and causation with respect to the fraud alleged in period 2 only. However, since no class representative made a purchase of GFC securities in period 2, they can make no § 10(b) claims for this period.[56/] Period 3 purchasers can show reliance and causation with respect to the fraud alleged in period 3 only. However, since no actionable fraud is alleged to have occurred in period 3, plaintiffs can establish

no § 10(b) claims for this period. All § 10(b) claims against

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[56/] The class representatives GFC securities during period 2. Since the theory relied upon by plaintiffs is that the alleged misrepresentations and omissions by defendants had the effect of erroneously inflating the value of GFC securities, plaintiffs can claim no damages based on the sale of GFC securities during any period.

no § 10(b) claims for this period. All § 10(b) claims against all defendants must be dismissed.[57/]

B. PROXY FRAUD CLAIM

1. Statute of Limitations

The proxy fraud violations alleged under 10 § 14(a) of the 1934 Act and Rule 14a-9 are based on misrepresentations and omissions in the 1987 and 1988 Proxy Statements. For the most part, these misrepresentations and omissions relate to GFC's general financial condition and to its real estate investments, as well as to the FHLBB's concern about the use by GFC of Gibraltar Savings' cash to pay GFC's public debt and dividends. By November 3, 1987, sufficient facts had been disclosed with respect to any misrepresentations and omissions in the 1987 Proxy Statement relating to GFC's financial condition, its real estate investments and the FHLBB's concerns about these matters to cause the statute of limitations to begin to run on claims arising from them. A holder of GFC securities who had been defrauded by

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[57/] For purposes of explanation, reference should be made to the description of the alleged fraud, purchases, and dates of disclosure in the Appendix.

The elements of aiding and abetting are: (l) the existence of an independent primary wrong, (2) actual knowledge by the aider and abettor of the wrong and of his or her role in furthering it, and (3) substantial assistance in the wrong." Hokama v. E.F. Hutton & Co., 566 F. Supp. 636, 641 (C.D. Cal. 1983) (citing Harmsen v. Smith, 693 F.2d 932, 945 (9th Cir. 1982), cert. denied sub nom. Smith v. Harmsen, 464 U.S. 822 (1983)). Since the underlying section 10(b) action is dismissed, there is no independent primary wrong and the aiding and abetting claim under section 10(b) is also dismissed.

statements in the 1987 Proxy Statement as to these matters was placed on notice of the falsity of them when GFC's catastrophic losses were publicly announced and commented upon between October 30 and November 3, 1987. Thus, any claim under § 14(a) predicated on allegations of misrepresentations or omissions in the 1987 Proxy Statement concerning GFC's financial condition and its real estate investments, as well as the FHLBB's concerns about Gibraltar savings, is now time-barred. Davis v. Birr, Wilson &Co., 839 F.2d 1369, 1369-70 (9th Cir. 1988).[58/]

The time-bar created as a result of the notice afforded by the October 30-November 3, 1987 disclosures would, of course, only apply to GFC's financial condition, its real estate investments and the FHLBB's concerns, not to claims based on misrepresentations and omissions concerning other matters. However, the Stahl lawsuit filed on May 14, 1987, also has a significant impact on the statute of limitations issue. One of the misrepresentations alleged as a basis for the § 14 (a) claim is that with respect to the indemnity agreement included in the 1987 Proxy Statement, GFC stated that it was not aware of any pending or threatened claims against GFC management, whereas in fact it knew of such claims. These identical allegations were made in the Stahl

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[58/] This Court has not found any Ninth Circuit case which conclusively establishes that Cal. Civ. Proc. Code § 338(d) applies to section 14(a) claims. However, since a Section 14(a) claim also sounds in fraud, this Court applies the same statute of limitations for Section 14(a) claims as it does for Section 10(b) claims.

See Ceres Partners v. Gel Assoca., 918 F.2d 349, 353 (2d Cir. 1990 (acknowledging that "ordinarily the same period of limitations governs actions under § 10(b) and 14.11); Roberts v. Magnetic Metals Co., 611 F.2d 450, 452 (3d Cir. 1979) (applying statute of limitations from state law to § 14(a) action).

lawsuit and the existence of Stahl must certainly have been sufficient to put a reasonable shareholder on notice as early as May 1987 of this fraudulent misrepresentation in the Proxy Statement. Once the lawsuit was filed, the truth was out. In this regard, the Court has not tried to analyze the treatment the financial press gave the filing of the Stahl lawsuit and the disclosure at that time of the allegations contained in it. Such disclosures would no doubt merely reinforce the conclusion the Court has already reached. Thus, the § 14(a) claim based on the statements made regarding pending or threatened litigation is barred by the statute of limitations. Finally, although the statute of limitations is obviously not a bar to any claim based on misrepresentations and omissions in the 1988 Proxy Statement, there do not appear to be new allegations of misrepresentations or omissions in that material. The Court is left to wonder what that claim is all about.

2. Failure to state a claim

A claim under § 14(a) requires that the plaintiff establish that the proxy statements were both materially false and misleading and that they caused the plaintiffs' loss. Herzog v. Russell, 483 F. Supp. 1346, 1353 & n.3 (E.D.N.Y. 1979), see also Schlick v. Penn-Dixie Cement Corp., 507 F.2d 374, 381-84 (2d Cir. 1974), cert. denied, 421 U.S. 976 (1975). Plaintiff must plead and prove both that material misstatements or omissions were made in the proxy statements and that there was a direct causal connection between the approved action or transaction and damage resulting to the plaintiff. See Stahl v. Gibraltar Fin. Corp., 967 F.2d 335 (9th Cir. 1992) (plaintiff has standing to bring direct action even where he has not relied an challenged misstatements). See also In re Tennecco Sec. Litig., 449 F. Supp. 528, 531 (S.D. Tex. 1978) ("In order to recover

damages under 14(a) the proxy violation must have caused the economic harm alleged.").

In order to decide which, if any, of the non-time-barred misrepresentations and omissions in the 1987 and 1988 Proxy Statements might serve as the basis of a claim under § 14(a), a determination must be made whether materiality and causation have been alleged as to them. This is a very difficult task because of the way in which plaintiffs have jumbled together numerous misrepresentations and omissions made over this long three year period. Nevertheless, the Court has tried to cut through this obscure pleading in order to make a determination as to each one of the non-time-barred misrepresentations and omissions that remains:

(1) The 1987 Proxy Statement failed to disclose that the FHLBB was demanding that GFC maintain the minimum regulatory capital required for Gibraltar Savings and that Gibraltar Savings not pay cash dividends to GFC in excess of 50% of Gibraltar Savings' annual income. Thus, it was not disclosed that GFC would have insufficient cash to consummate the acquisition of FSBF and that it would be forced to sell to Gibraltar savings $35 million of the preferred stock of its Gibraltar Savings of Washington subsidiary in order to close the FSBF transaction. Assuming that after the 1987 Proxy Statement was sent out, GFC did enter into a Capital Maintenance Agreement with the FHLBB which required it to structure the FSBF acquisition as it did, there is still no allegation as to how the acquisition of FSBF caused the plaintiffs' loss. one can only speculate as to how the acquisition of FSBF is tied to GFC's losses or to plaintiffs' losses. Nevertheless, resolving any and all doubts in favor of the plaintiff, the Court will permit this claim to go forward until it can be tested by a fully dispositive motion.

(2) The 1987 Proxy Statement allegedly failed to accurately report the total compensation of certain executives or the fact that certain executives received $12 million in bonuses. No facts are alleged from which an inference can be drawn that such payments were wrongful, or how and in what way these omissions caused plaintiffs' loss. Thus, a pleading of materiality and causation is lacking here also. However, here too the Court will await a fully dispositive motion on this claim.

(3) The 1987 Proxy Statement allegedly failed to disclose that GFC's officers and directors were both unqualified and incompetent. This allegation is wholly lacking in specificity since it fails to name any officer or director, or to describe how this omission caused the plaintiffs' loss. This claim is too vague to be permitted to proceed.

(4) Although the 1988 Proxy Statement is claimed to have been fraudulent, only two corporate acts are alleged to have been affected by these proxy materials. Those are the entering into the indemnity agreement and the acquisition of FSBF, yet both of these acts were voted upon and approved in 1987. Therefore, all claims based upon misrepresentations or omissions alleged with respect to the 1988 Proxy Statement fail for lack of the threshold requirement of materiality. Misrepresentations or omissions are material if "there is a substantial likelihood that a reasonable shareholder would consider (them] important in deciding how to vote."[59/] The Court cannot simply presume materiality, and because no facts have been alleged to establish it, this claim would ultimately fail on a dispositive motion. Therefore, it cannot proceed now.

[59/] TSC Ind., Inc., v. Northway, Inc., 426 U.S. 438, 449 (1975).

Based on the foregoing analysis, the § 14(a) claims arising out of the alleged misrepresentations and omissions in the 1987 Proxy Statement which are specifically identified in categories (1) and (2) above may proceed. The claims based on the 1988 Proxy Statement may not. All other claims under § 14(a) which are not barred by the statute of limitations are dismissed for failure to state a claim.[60/]

3. Substantial Connection To Solicitation Efforts

The only persons subject to liability for violations of § 14(a) are persons who solicit the proxy and persons who "permit the use of [their] names to solicit" the proxy. U.S.C. § 78n(a). In the Ninth Circuit, the element of scienter is required for a claim under § 14(a) when the defendant is not the corporate issuer of the proxy material. Zatkin v. Pr muth, 551 F. Supp. 39, 45 (S.D. Cal. 1982) (plaintiff must allege scienter against accountant for liability pursuant to § 14(a)).

The Ninth Circuit first articulated the standard for liability pursuant to § 14(a) in Yamamato v. Omiya, 564 F.2d 1319 (9th Cir. 1977) by stating:

> (I)n order to hold a person liable for proxy violations, one must show, at the very least, a substantial connection between the use of the person's name and the solicitation effort.

[60/] As to all § 14(a) claims which are dismissed, the aiding and abetting claims under § 14(a) are also dismissed. Furthermore, as to all claims for federal securities violations which are dismissed, the claims alleging controlling person liability are also dismissed.

Id. at 1323 (the appearance of defendants--the proposed buyer of building--name and address in the proxy statement did not reveal any control by defendant over the statement or his adoption of it). The "substantial connection" requirement is satisfied as against parties who did not actively solicit the proxy materials only when those parties permitted the use of their names and directly benefited by the shareholders' favorable vote. Mendell v. Greenberg, 612 F. Supp. 1543, 1552 (S.D.N.Y. 1985), aff'd in part, 927 F.2d 667 (2d Cir. 1990). Moreover, the mere participation in the drafting of the proxy statement is insufficient to constitute solicitation. Id. at 1552.

Plaintiffs have failed to allege a substantial connection between the use of Rifkind's, Gibson's, Ernst's, Post's, Boyle's and Glupker's names and any solicitation efforts. The allegation that these defendants participated in the preparation of the proxy statements or merely allowed their 1985 reports to be republished and included in the proxy statement is insufficient to constitute "solicitation" under § 14(a). Moreover, there is no allegation that Rifkind, Gibson or Ernst benefitted in any way from the vote of the GFC shareholders on the FSBF acquisition. As to Post, Boyle and Glupker, they were employed by Gibraltar Savings not GFC. The proxy statements were GFC materials. Further, the only allegations relating to Post's, Boyle's and Glupker's participation in any of the alleged fraud is that concerning the Galleria. The facts concerning the alleged fraud regarding the Galleria were disclosed by November 3, 1987, and thus-a proxy claim based upon this allegation is time-barred. The § 14(a) claims against these defendants are dismissed.[61/]

[61/] The aiding and abetting claim under section 14(a) is also dismissed with prejudice against these defendants as there are insufficient allegations of "substantial assistance" and "actual

III. RICO

18 U.S.C. § 1964 (c) provides a private right of action under RICO. The section states that:

> [a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

A violation of § 1962 is established by proof:

> (1) that the defendant (2) through the commission of two or more acts (3) constituting a "pattern" (4) of "racketeering activity" (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an "enterprise" (7) the activities of which affect interstate or foreign commerce. Moss v. Morgan Stanley Inc.., 719 F.2d 5, 17 (2d Cir. 1983), cert. denied sub nom. Moss v. Newman, 465 U.S. 1025 (1984).

Here, plaintiffs allege that certain members of the management of GFC together with GFC's accountants formed an enterprise which engaged in a pattern of racketeering activity in violation of RICO. Defendants challenge the RICO allegations made against them as lacking one or more of the elements necessary to establish this claim.

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knowledge."

A. Predicate Acts

Racketeering activity as defined in § 1961(l) includes "fraud in the sale of securities" and acts indictable under the federal mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343. Plaintiffs' claims for "fraud in the sale of securities" under § 10(b) have been dismissed against the moving defendants.[62/] Acts of proxy fraud under § 14(a) do not qualify as predicate acts under RICO. First Pacific Bancorp, Inc. v. Bro, 847 P.2d 542, 546 (9th Cir. 1988). Also, acts of fraud "in connection with the sale of securities" have been found not to qualify as predicate acts under RICO. See In Re Par Pharmaceutical, Inc. Sec. Litig., 733 F. Supp. 668, 684 (S.D.N.Y. 1990) ("only fraud that occurs as part of the actual securities transaction," not just in connection with the sale of a security, is a predicate act under RICO). Thus, there remains only the possibility of finding that the acts of mail or wire fraud alleged against plaintiffs furnish this necessary element of a RICO violation. However, acts of mail or wire fraud must be alleged with sufficient particularity so that the Court is satisfied that it knows-what they are and who committed them. Also, the Court should be able to infer from the allegations that each of the defendants participated in some way in the commission of

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[62/] Because plaintiffs fail to establish viable securities claims, they fail to establish predicate acts for RICO. See Nutis V. Penn Merchandising Corp., 610 F. Supp. 1573, 1583 (D.C. Pa. 1985), aff'd, 791 F.2d 919 (1986). While the Ninth Circuit has applied a four year statute of limitations to securities claims as predicate acts under RICO, see Stitt v. Williams, 919 F.2d 516, 525 (9th Cir. 1990), unless plaintiffs establish a valid securities claim to begin with, there is no predicate act to which to apply the time bar.

the predicate acts.[63/] certainly, Rule 9(b) requires that as to each defendant, there be something more than general allegations that the defendants were "all in on it." Looking carefully at the Second Amended Complaint, the Court is uncertain as to whether mail or wire fraud is even claimed. It is certain that neither mail fraud nor wire fraud has been adequately alleged.

B. Pattern of Racketeering Activity

The Court finds no sufficient allegation of racketeering activity and consequently can find no pattern of such activity. There must be predicate acts alleged and there must also be "a pattern of racketeering activity" in which the participation of each RICO defendant is alleged. 18 U.S.C. § 1961(l) defines this pattern as requiring "at least two acts of racketeering activity." The Supreme Court has explained that although two acts may be necessary, two may not be sufficient. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.14 (1984). Proof of a pattern requires continuity plus relationship with respect to the alleged acts of racketeering activity. Id.

In determining whether the acts of racketeering are sufficiently related, courts should look for "criminal conduct (that) embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 240 (1988) (quoting i 3575(e) of Organized Crime Control Act of 1970).

[63/] Blake v. pierdorff, 856 F.2d 1365, 1368-72 (9th 28 Cir. 1988).

To establish continuity "it must also be shown that the predicates themselves amount to, or that they otherwise constitute a threat of, continuing racketeering activity." Id. at 240 (emphasis added). The Supreme Court has explained that, "[c]ontinuity' is both a closed- and open- ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition . . . A plaintiff alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long term criminal conduct." Id. at 241-42.

Application of this standard to the allegations in the Second Amended Complaint does not result in a finding of the required relationship or continuity between the various acts of the defendants, thus making it impossible for plaintiffs to sustain a RICO claim based on them. As an example, several claims relate to the distribution of false or misleading information in the second 1986 Annual Report. It is alleged that defendants Williamson, Janis, Thayer, Nussbaum, Mooney[64/], and Kang all engaged in fraudulent activities through the use of the mails in connection with the authorization, preparation, and/or dissemination of incorrect financial statements included in the 1986 Annual Report. All of this activity took place in and around April of 1987 and related solely to the distribution of this one report, leading to the conclusion that these activities were not conducted over a "substantial period of time," nor did they

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[64/] It is alleged that Mooney authorized the preparation of misleading financials for 1985, 1986 and 1987, The claims relating to the other years are treated below.

of continuity. Courts in the Ninth Circuit have consistently held that isolated activities which take place over a brief period of time, are not sufficient to allege a pattern under RICO. See Jarvis v. Regan, 833 F.2d 149, 153 (9th Cir. 1987) (no pattern 20 established in RICO claim where predicate acts related to single objective and presented no threat of continuing); Service Engla, Co. v. Southwest Marine, Inc., 719 F. Supp. 2500, 1508 (N.D. Cal. 1989) (activity extending over a few weeks or months with no threat of continuity does not constitute a pattern for purposes of RICO). It is not enough to allege that all the defendants were involved with GFC or that all of the acts occurred in connection with GFC's corporate affairs. If it were, all claims involving the corporate affairs of public companies would be RICO claims.

All of the allegations of this extraordinarily long Second Amended Complaint require examination defendant by defendant because "courts will generally decline to consider in the pattern analysis as to one defendant misconduct 11 adequately alleged only as to a codefendant." Arthur Mathews, et al., Civil RICO Litigation § 4.03[E] at 8-82 13 (1991). Looking at the allegations with this principle in 14 mind, there is neither continuity nor relationship, and thus no pattern.

C. Enterprise

A RICO claim requires that there be an enterprise through which the pattern of racketeering is conducted. Under 18 U.S.C. § 1961(4), an enterprise is defined as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." Thus, "a group of persons associated together for a common purpose of engaging in a course of conduct," the existence of

which "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit" may qualify as a RICO enterprise, United States v. Turkette, 452 U.S. 576, 583'(1980); United States v. Feldman, 853 F.2d 648, 657 (9th 3 Cir. 1988), cert, denied, 489 U.S.. 1030 (1989). However, "[T]o avoid dismissal for failure to state a claim, a [RICO] plaintiff must plead specific facts, not mere conclusory allegations, which establish the existence of an enterprise." Comwest Inc. v. American Operator Services, Inc., 765 F. Supp. 1467, 1475 (quoting Elliott v. Foufas, 867 F.2d 877, 881 (Sth Cir. 1989)). Here, as stated, it is alleged that the RICO enterprise is alleged to be an association in fact consisting of defendants Young, Williamson, Thayer, Janis, Nussbaum, Mooney, Flournoy, Spitz, Sprayregen, Leventhal, Kang, and Peat ("RICO defendants").

In this case, the plaintiffs' RICO claim is defective primarily because of the conclusary nature of the allegations of the enterprise. Plaintiffs allege the conclusion that the defendants "constituted an association in fact and an enterprise which operated separately and distinctly from Gibraltar," but fail to allege any facts which would permit an inference that this group actually did operate separately and distinctly from GFC or Gibraltar Savings. While plaintiffs allege that the RICO defendants "devised a plan", "organized and carried out their plan", and kept their efforts in furtherance of the plan secret, the complaint noticeably lacks any allegation of organized activity other than that which would normally be found in a large public company. Instead, claim after claim is based on acts by separate individuals and entities carrying out their usual functions as officers, directors or employees of GFC or Gibraltar Savings. Plaintiffs sees to be asking the Court to accept the conclusion that if acts are alleged that could constitute violations of the securities laws, then the persons who

committed then are necessarily part of an enterprise engaged in racketeering activity. The Court cannot make such a leap.

The court in United States v. Riccobene, 709 F.2d 214 (3d cir.), cert. denied sub. nom Ciancaglini v. United States, 464 U.S. 849 (1983), analyzed the concept of a RICO enterprise and found that it must have three components. First, the ",ongoing organization' component relates to the superstructure or framework of the group [and requires that] some sort of structure exists within the group for the making of decisions, whether it be hierarchical or consensual." Id. at 222. Second, the "'various associates [must] function as a continuing unit' (which requires] that each person perform a role in the group consistent with the organizational structure . . . and which furthers the activities of the organization." Id. at 223. Third, the enterprise must be "'an entity separate and apart from the pattern of activity in which it engages [requiring] an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses." Id. at 223-24.

The pleading requirements for a RICO claim are imposed by the courts because "RICO was not designed to serve as a recidivist statute, imposing heavier sentences for crimes which are already punishable under other statutes. The Act was not intended to be a catchall reaching all concerted action of two or more criminals involving two or more of the designated crimes." United States v. Bledsoe, 674 F.2d 647, 659 (8th Cir.), cert. denied sub. nom Phillips v. United States, 459 U.S. 1040 (1982). The same may be said of two or more defendants involved in two or more securities violations. RICO was not designed to grant all securities fraud claimants an automatic entitlement to treble damage awards.

The Second Amended Complaint not only fails to allege facts which would permit an inference that there was an enterprise with a common purpose, but also wholly fails to allege facts that would permit the additional inference that the enterprise was distinct from the claimed pattern of racketeering. "The 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages," Turkette, 452 U.S. at 583. In analyzing this feature of RICO, the circuit courts have reached differing conclusions on the issue of whether "a RICO enterprise must have an ascertainable structure distinct from that inherent in the pattern of racketeering activity," Feldman, 853 F.2d at 659-60.

The Eighth and Third Circuits[65/] require a structured, ongoing organizational unit while the Second and Eleventh Circuits generally find that repeated criminal activity by a group with no other organizational structure may be sufficient. Mathews at § 5.04 at 5-22 (1991). While the Ninth Circuit has thus far declined to decide the question, Feldman, 853 F.2d at 659-60, district courts in the Ninth Circuit have generally taken the view that a separate ascertainable structure must be alleged. It is not enough to define the enterprise by the racketeering activities it engages in; the enterprise must be shown to exist as a unit apart from the sum of its activities. Rhoades v. Powell, 644 F.Supp. 645, 673 n.21 (E.D. Cal. 1986), aff'd sub. nom Rhoades v. Merrill Lynch, Pierce, Fenner & Smith, 961 F.2d 217 (9th Cir. 1992); In Re Nat'l Mortgage, Equity Corp. Mortgage, Pool, 636 F. Supp. 1138, 1160 (C.D. 18 Cal 1986); Medallion TV Enter, Inc. v. SelecTV of California, Inc., 627 F. Supp 1290, 1294 (C.D. Cal. 1986), aff'd 833 F.2d 1360 (9th Cir. 1987), cert. denied, 492 U.S. 21 917 (1989);

65/ The Fourth, Fifth and Seventh circuits generally follow the structured approach as well.

Allington v. Carpenter, 619 F. Supp. 474, 478 22 (C.D. Cal. 1985).

District courts around the country have considered the two views and generally agreed with the Eighth Circuit's approach because that of the Second Circuit "appears to render the 'enterprise, requirement superfluous" and "ignores the organizational nexus at the heart of the RICO scheme." Allington, 619 F.- Supp. at 479; In re National Mortgage, 636 F. Supp. at 1160. This Court agrees with that analysis,[66/] particularly under the facts of this case, and will follow the Eighth Circuit's approach requiring that a separate structure exist apart from the pattern of racketeering activity.

"[U]nder RICO, an enterprise cannot simply be the undertaking of the acts of racketeering, neither can it be the minimal association which surrounds these acts." Bledsoe, 674 F.2d at 664. Rather, the "distinct structure (of the enterprise separate from that inherent in the conduct of a pattern of racketeering activity) might be demonstrated by proof that a group engaged in a diverse pattern of predicate acts or that it has an organizational 17 pattern or system of authority beyond what was necessary to perpetrate the predicate [acts]." Id. at 665.

Plaintiffs claim that the RICO defendants "were all part of Young's inner circle at Gibraltar organized into a group . . . [which] operated separately and distinctly from Gibraltar and the legitimate business and management of Gibraltar.[67/] "The purpose . . . of the enterprise was to

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[66/] In a civil case alleging fraud in the sale of securities, plaintiff should be required to prove each element of RICO in order to qualify for treble damages.

[67/] Plaintiffs' RICO Case Statement at 97 (May 13, 1991).

infiltrate and subvert the legitimate management of Gibraltar and to perpetuate the continued dominance and control of the members of the enterprise over Gibraltar by covering up and concealing substantial operating and other losses by Gibraltar. . . . " Id.

Even a cursory analysis of the enterprise as alleged demonstrates that there is no structure which exists separate and apart from the pattern of racketeering activity. The very purpose of the enterprise was to promote the alleged fraudulent acts. The only way the enterprise can be identified is by looking at the definition of the racketeering activities each defendant allegedly participated in. Moreover, plaintiffs allege no overarching structure. Other than the allegation that Young headed the enterprise, no identification of the officers, directors or employees of the enterprise is even attempted. Thus, plaintiff has not alleged an association-in-fact which exists separate and apart from the pattern of racketeering activity. The conclusion may be there, but the facts are not. After all this time and all the prior litigation, plaintiffs still are unable to allege a factual basis for their RICO claims.

As a final point, in plaintiffs' RICO Statement, they are apparently attempting to assert a claim under U.S.C. § 1962(b) as well as § 1962(c) by stating that, "The enterprise (members of Young's inner circle) engaged in racketeering activities as part of their efforts to maintain dominance and control over Gibraltar. As a result of such control, the members of the enterprise acquired interests in Gibraltar in the form of GFC stock options and otherwise." Section 1962(b) provides that, "It shall be unlawful for any person through a pattern of racketeering activity . . . to acquire . . . any interest in or control of any enterprise which is engaged in . . . interstate . . . commerce." Here, plaintiffs do not allege the acquisition of an interest in the enterprise, defined

is that plaintiffs are confused about the factual theory of their RICO claim. The Court is also confused.

D. Inquiry

Civil RICO plaintiffs must allege and prove an injury to "business or property." Oscar v. Univer. Students Co-op. Ass'n, 965 F.2d 783, 785 (9th Cir. 1992) ("injury requires proof of concrete financial loss"); Kaiser v. Fischbach & Moore, 793 F.2d 1100, 1104 (9th Cir.), cert. denied, 479 U.S. 949 (1986) ("Actual injury attributable to something the . . . laws were designed to prevent . . . is . . . the sine qua non of recovery (on theory of RICO)"). The plaintiffs here have alleged injury to the value of their investment resulting in the main from securities fraud. However, examining the chronology of events with respect to each of the plaintiffs, it becomes clear that as to certain of the RICO allegations, plaintiffs have alleged activity by the defendants that could not possibly have caused them any injury, and which, therefore, cannot be the basis for recovery by them in a civil RICO action. Here again, attempting to relate the defendants' "racketeering activity" over a three year period to the plaintiffs' buys and sells makes it almost impossible to analyze the injury element of their RICO claims. The pleading is obscure in this regard, and probably deliberately so. The RICO statement filed by plaintiffs makes it no clearer.

E. Summary of RICO

The RICO claims against the moving defendants must fail for many reasons. The most significant flaw in the Second Amended Complaint, of course, is the lack of a 13 sufficient allegation of an enterprise, certainly not a rise separate from any pattern of racketeering activity. Moreover, many of the claims that arguably allege viable

Moreover, many of the claims that arguably allege viable predicate acts fail to state an injury, while others lack the necessary specificity required of fraud claims. Some are based on securities violations which this Court has already found insufficient to state a claim, while others are simply based on acts which cannot qualify as predicate acts of racketeering activity within the definition of the RICO statute. Finally, those claims that survive these initial waves of scrutiny do not meet the standards set for establishing a pattern of racketeering activity, leaving plaintiffs no cognizable claim under RICO.

IV. STATE LAW CLAIMS

Plaintiffs' sixth, eighth, ninth, tenth, eleventh, twelfth, and thirteenth causes of action contain allegations under state law against moving defendants Post, Boyle, Harrison, Glupker, Nussbaum, Rifkind, Ernst, Peat, and Gibson. The same facts alleged in support of the federal claims are also alleged in support of these state law claims.

A. Breach of Fiduciary Duty (Sixth Cause of Action)

1. Nussbaum

As to this claim, Nussbaum correctly argues that plaintiffs, state law claim for breach of fiduciary duty is barred by the statute of limitations, but incorrectly relies on a two year statute. The statute of limitations to be applied here is found in Cal. Code of Civ. 17 Pro. § 338(d), which establishes a three year statute of limitations for "[a]n action for relief on the ground of fraud or mistake.[68/] This

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[68]/ See Meadows v. Bicrodyne CoM,, 785 F. 2d 670, 671 (9th Cir. 1986) (three year statue of limitation for fraud or mistake applied to claims for fraud and breach of fiduciary duty.) The Court notes

statute begins to run "when the plaintiff discovered or could have discovered the fraud with the exercise of reasonable diligence . . . [and that] is usually question for the trier of fact." Nevada Power, 955 F.2d 1304 at 1308 (quoting General Bedding Corp. v. Echeyarria, 947 F.2d 1395,.1397 n.2 (9th Cir. 1991)). Nevertheless, "[r]easonable diligence is tested by an objective standard, (citation omitted] and when uncontroverted evidence irrefutably demonstrates plaintiff discovered or should have discovered the fraudulent conduct, 8 the issue may be decided on summary judgment. It Davis v. Birr, Wilson & Co., 839 F.2d 1369, 1370 (quoting Kramas v. Security Gas & Oil, Inc., 672 F.2d 766, 770 (9th Cir.), cert. denied, 459 U.S. 1035 (1982); accord Mosesian v. Peat, Marwick, Mitchell & Co., 727 F.2d 873, 877 (9th Cir.), cert, denied, 469 U.S. 932 (1984). The claims against Nussbaum are time-barred because all of the material claims against Nussbaum involve alleged misrepresentations relating to losses from the Galleria. Because those losses were sufficiently disclosed by November 3, 1987 at the latest, the statutory period began to run on that date, and any actions based on those misrepresentations or omissions are time-barred.

2. Post, Boyle, Harrison and Glupker

The allegations of breach of fiduciary duty against Post, Boyle, Harrison and Glupker are also time-barred, and fail to state a claim. With respect to those allegations that center on misrepresentations or omissions on

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and rejects the application of a four year statue of limitation in Davis Cox v. Summa Corp., 751 F.2d 1507, 1520 (9th Cir. 1985). Davis is distinguishable for its emphasis on the action at issue as a breach of a director's duties for waste and mismanagement. Here the plaintiffs are alleging breach of duties based on fraudulent misrepresentations and omissions.

subjects covered by the October/November 1987 disclosures, the claims have been brought too late, as discussed above. The remainder of the allegations state no claim upon which relief may be granted, as plaintiffs can demonstrate no injury. As discussed in greater detail below in the section on the state law fraud claims, these non-time-barred claims relate to statements and press releases made over a period when no representative plaintiff purchased GFC securities. If the representative plaintiffs bought no GFC securities in reliance on any statements by these defendants, they cannot allege any injury from any breach of fiduciary duty on them.[69/]

3. Ernst/Peat

As discussed below, in relation to the cause of action for constructive fraud, the plaintiffs have failed to allege a fiduciary relationship between themselves and defendants Ernst or Peat. Without such a relationship, there can be no breach of duty arising out of such a relationship.

4. Gibson

By order dated June 18, 1991 and entered July 15, 1991, this Court dismissed with prejudice the claim of breach of fiduciary duty against Gibson. Plaintiffs were given no right to replead this cause of action in the Second Amended

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[69/] Because the plaintiffs' claim is essentially that defendants breached their fiduciary duty by way of fraudulent misrepresentations and omissions, if a constructive fraud cannot be alleged, there is likewise no claim for breach of duty. See Byrum v. Brand, 268 Cal. Rptr. 609, 616-18 (analysis of breach of fiduciary duty intertwined with analysis of constructive fraud). Therefore, the plaintiffs' failure to state claims against the defendants for constructive fraud also impacts negatively on their ability to state a claim in this cause of action.

Complaint. It is dismissed with prejudice pursuant to the prior order of this Court. Although an award of sanctions would be appropriate based on this deliberate violation of the Court's prior order, the Court will resolve all doubts in favor of plaintiff and decline to make such an award.

B. Actual and Constructive Fraud (Eighth and Ninth Causes of Action)

The necessary elements of a claim for actual fraud under Cal. Civ. Code § 1572 are "false representation as to a material fact, knowledge of its falsity, intent to defraud, Justifiable reliance and resulting damage." Wilhelm v. Pray, Price, Williams & Russell, 231 Cal. Rptr. 355, 357 (Cal. App. 2 Dist. 1986) (emphasis in the original). Constructive fraud "allows conduct insufficient to constitute actual fraud to be treated as such where the parties stand in a fiduciary relationship. The difference between actual fraud and constructive fraud is primarily in the type of conduct which may be treated as fraudulent, such as a failure to disclose material facts within the knowledge of the fiduciary." Matter of Estate of Gump, 2 Cal. Rptr. 2d 269, 281 (Cal. App. 1 Dist. 1991) (emphasis in the original).[70/]

By matching up the various allegations as to what the defendants did with the three periods of time relevant to the representative plaintiffs, claims, the Eighth and Ninth Causes of Action for actual and constructive fraud are revealed to be insufficient, either because they fail to state the elements of

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[70/] Cal. Civ. Code § 1573 states: "Constructive fraud consists: 1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; or, 2. In any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud."

either type of fraud or because they 8 have been brought outside of the three year period of the statute of limitations applicable to these claims.[71]

1. Post, Boyle, Harrison and Glupker

Claims based on the allegations that the defendants knew of real estate losses before October 1987, and that they prepared false and misleading documents for shareholders and the SEC before October 1987 in order to cover up the losses all fail because they are barred by the statute of limitations. As has been discussed in the section on federal securities fraud, plaintiffs clearly should have discovered the fraud by the exercise of reasonable diligence by November 3, 1987 but did not bring the instant action until November 16, 1990, more than three years later. That the October 1987 report misstated the period over which the losses occurred can neither excuse the plaintiffs from the running of the statute of limitations, nor can it furnish an independent basis for either actual or constructive fraud claims.[72]

The allegations that the 1987 Proxy Statement contained a misrepresentation that the Board was unaware of any threatened claims against it has also been considered, and rejected, in the federal securities fraud context. In that analysis, the Court determined that even if those responsible for the Proxy Statement might have been aware of threatened claims, plaintiffs have alleged no loss resulting from that misrepresentation. That flaw is no less fatal here, where to allege state law fraud the plaintiffs must allege an injury from the fraud. None is alleged here, and the claim must fail.

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[71] See Cal. Civ. Proc. Code § 338(d).

[72] supra, note 46.

The allegations of fraud in the preparation of documents after the October/November 1987 announcement of losses also must fail. These documents include the 1987 Annual Report and 10-K, the 1988 Proxy Statement and the January 1988 press release. while all of these alleged acts fall within the period in which claims would not be time-barred, they also fall within the period in which no representative plaintiff bought GFC securities--a period within which no representative plaintiff can show justifiable reliance on any misrepresentations. As a final point,for any period in which a representative plaintiff did buy securities, and therefore can allege reliance on some alleged misrepresentation or omission by defendants, they must allege actual reliance. The fraud on the market theory created with respect to federal securities claims is not viable with respect to the state law fraud claims. See In Re 3Com Sec. Litig., 761 F.Supp. 1411, 1419 (N.D. Cal. 1990) ("Plaintiffs . . . may not rely on the 'fraud on the market' theory for common law fraud claims," and must "allege individual reliance."). This means that as to the state law fraud claims, it is highly unlikely that the required commonality for a class action could ever be shown.

2. Nussbaum

The allegations made specifically against Nussbaum all relate to the period before the October/November 1987 disclosures. Therefore, the actual and constructive fraud claims against him are time-barred.

3. Rifkind

The majority of the allegations upon which the fraud claims against Rifkind are based occurred before the October/November 1987 disclosures and are therefore time-barred. Plaintiffs also allege a misrepresentation in the October 30, 1987 press release relating to the actual

period in which Gibraltar's losses were sustained. However, the Court has already determined these statements to be immaterial.[73/] The other major claim against Rifkind relates to statements made in 1988 that GFC was in "sound financial condition." These statements were made during a period in which no representative plaintiff bought GFC securities. Therefore, there is no representative plaintiff who can claim justifiable reliance.

4. Ernst

The fraud allegations against these defendants fail to state a claim. As defendants properly argue in their motion, it is not clear that Ernst made any affirmative representations in performing its audit of GFC. But, even more clearly, plaintiffs' allegations do not include sufficient averments of Ernst's knowledge that the audits were false or that there was any intent to defraud on Ernst's part. The very language that plaintiffs use to describe Ernst's involvement in GFC's financials--stating that Ernst was reckless and/ or negligent and that Ernst only came to know of the inaccuracies after their reports were issued belies any belief in intentional misrepresentation.

The claim of constructive fraud is also faulty for the same reasons, but in addition because the required fiduciary relationship between Ernst and the plaintiffs is absent. See Byrum, 268 Cal. Rptr. at 617 (1990) (fiduciary relationship essential to claim for constructive fraud). Plaintiffs only glancingly allege a fiduciary relationship between themselves and Ernst, while Ernst points out that the law does not

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[73/] See supra, note 46.

ordinarily recognize accountants as fiduciaries.[74/] Without a sufficient allegation of such a relationship, the claim for constructive fraud cannot be sustained.

Finally, the allegations against Ernst are time-barred. They involve inaccuracies in financial statements made before the October/November 1987 disclosures. The inaccuracies are relevant only to the extent that they related to understated losses, losses which were disclosed by November 3, 1987, more than three years before plaintiffs filed their complaint.

5. Peat

The analysis of these claims against Peat is much the same as that relating to Ernst. The claims are flawed in the same ways, namely failure to allege knowledge on the part of Peat, failure to allege affirmative representations by Peat, and failure to allege a fiduciary duty. There is also the same limitations problem, heretofore discussed, as to the allegations of fraudulent acts prior to November 3, 1987. Although there is no such problem as to the claims against Peat based on inaccuracies and failures to disclose in relation to financial reports issued in 1988, these allegations fail to state a fraud claim on other grounds. These allegations relate to a period when because no representative plaintiff bought GFC securities, no representative plaintiff can properly allege justifiable reliance.

6. Gibson

By order dated June 18, 1991 and entered July 15, 1991, this Court dismissed with prejudice the claim against Gibson for constructive fraud. Nevertheless, plaintiff

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[74/] See, e.g., Painters of Phil, plot, Council v. P Waterhouse, 879 F.2d 1146, 1149 (3d Cir. 1989).

did not hesitate to replead this claim. This claim is again dismissed with prejudice pursuant to the prior order of this Court. Further, analysis of the specific allegations made in support of the actual fraud claims against Gibson leads to the inevitable conclusion that all of them must be dismissed for failure to state a claim. Plaintiffs first allege that Gibson failed to disclose that litigation had been threatened against GFC management. As discussed, the claim is made that Gibson prepared a draft of the indemnity agreement which was included in the 1987 Proxy Statement which stated that GFC was not aware of any pending or threatened claims against management. This statement was allegedly false since Gibson had received two letters[75/] which indicated that a partner in GCB was threatening litigation. Further, Gibson is alleged to have known that one of GFC Is shareholders had initiated litigation against GFC. The two lawsuits which arose from these allegations were the Stahl suit against GFC and the partnership litigation brought against GFC. The Second Amended Complaint fails to-allege the materiality of this misrepresentation or the way in which it caused the representative plaintiffs any injury since it never alleges that litigation against Gibraltar management actually resulted.[76/]

Plaintiffs next allege fraud based on misrepresentations regarding the method by which real estate investments were valued. Plaintiffs should have discovered this alleged misrepresentation by November 3, 1987, more than three years before November 16, 1990. This allegation of fraud is time-barred.

[75/] The Dorman & Wheeler and the Adams letters.

[76/] In fact no litigation against management did result from these allegations.

The third allegation of fraud against Gibson is that they misrepresented the 1987 Proxy Statement as complete and accurate. Several categories of facts are alleged to have been omitted from the statement, contrary to Gibson's assertions of completeness. The first was the existence of two versions of the 1986 financials containing conflicting accounting with respect to the Galleria. As discussed, fraud based on this allegation is time-barred.[77/]

The second set of facts alleged to have been omitted involve the acquisition of FSBF. It is claimed that the 1987 Proxy Statement was misleading because it failed to disclose the terms of a Capital Maintenance Agreement under the terms of which GFC agreed to maintain the minimum regulatory capital required-for Gibraltar and also agreed not to cause Gibraltar to pay cash dividends to GFC in excess of 50% of its income for the year. The Proxy Statement also failed to disclose that in order to consummate the acquisition, GFC would be forced to sell Gibraltar Savings $35 million of the preferred stock of its Gibraltar Savings of Washington subsidiary. Aside from all the other difficulties with this claim, there is no allegation of how the acquisition of FSBF caused any injury to plaintiffs. No facts are alleged which tie the acquisition of FSBF to Gibraltar's losses or to the plaintiffs I losses. Both causation and injury are wholly lacking as to this claim.

The last of the facts that Gibson allegedly failed to report was the total compensation of certain executives and the fact that certain executives received $12 million in bonuses. There is no allegation that these payments were fraudulent, for an improper purpose or without authority. Materiality and

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[77/] See Cal. Code. Civ. Proc. § 338 (d) .

causation with respect to these allegations is completely lacking.

The fourth allegation of fraud is that Gibson represented that the special Committee had found no evidence of wrongdoing by the management of GFC. In this regard, the complaint never alleges that this was in fact a false statement or that the Committee did find evidence of wrongdoing. As with countless other allegations, the Court is left to wonder where the other required elements of a fraud claim may be found.

The remaining allegations against Gibson are either in the form of omissions--Gibson was aware that Gibraltar stated it was in sound condition although Gibson was aware that the FHLBB had expressed concern about the soundness of Gibraltar or are overly broad and devoid of any specificity regarding Gibson's fraudulent behavior--"Gibson Dunn prepared or participated and assisted in the preparation of (multiple financial reports, press releases and public statements]."[78/] Gibson cannot be held liable for failure to disclose the FHLBB's concerns, since, as the attorney for GFC, Gibson had no fiduciary duty toward the representative plaintiffs here. See e.g. Skarbrevik v. Cohen, England Whitfield, 282 Cal. Rptr. 627 (1991) (counsel for corporation has no fiduciary duty toward individual shareholders). Moreover, general allegations of preparation and assistance by an attorney are inadequate. See e.g. Hokama v. E.F. Hutton & Co., Inc., 566 F. Supp. 636, 645 (C.D. Cal. 1983).

C. Failure to Plead with Particularity

Fed. R. Civ. Proc. 9(b) provides that in "all averments of fraud or mistake, the circumstances constituting

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[78/] See, e.g. Complaint at 79-81

fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." See In Re Worlds of Wonder-Sec. Lit., 694 P. Supp. 1427, 1432 (N.D. Cal. 1988). The rule requires the plaintiff to identify the circumstances constituting fraud so that defendant can prepare an adequate answer by stating the "time, date and specific content or nature of the fraudulent representations or omissions." Id. Moreover, this requirement applies "even when the fraud relates to matters particularly within the knowledge of the opposing party." However, "plaintiffs are entitled to plead the defendants' scienter in conclusory fashion," Hokama, 566 F. Supp. at 645. The Ninth Circuit has explained that "[a] pleading is sufficient under rule 9(b) if it identifies the *15* circumstances constituting fraud so that a defendant can prepare an adequate answer from the allegations.... [and] [w]hile statements of the time, place and nature of the alleged fraudulent activities are sufficient, mere conclusory allegations of fraud are insufficient." Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1439 (9th Cir. 1987).

The court in Bruns v. Ledbetter, 583 F. Supp. 1050 (S.D. Cal. 1984) stated that a complaint, to satisfy Rule 9(b) "must set forth:

> (1) the nature of each individual defendant's participation in the fraud, including facts constituting scienter and an explanation of the defendant's duty toward the plaintiff;
>
> (2) whether the defendant is being sued as a primary defendant or as an aider and abettor; and
>
> (3) as to allegations on information and belief, a statement of the source of the information and

With respect to "false or misleading information in prospectuses, registration statements, annual reports, press releases, or other 'group published information,' it is 16 reasonable to presume that these are collective actions of the officers. Under such circumstances, a plaintiff fulfills the particularity requirement of Rule 9(b) by pleading the misrepresentations with particularity and where possible the roles of the individual defendants in the misrepresentations." Blake v. Dierdorff, 856 F.2d 1365, 1369 (9th Cir. 1988) (emphasis added). Nevertheless, this observation should not apply to fraud claims brought against attorneys and accountants five years and many lawsuits after the fact. A conclusory pleading under these circumstances should not be permitted.

To summarize, because all of the specific allegations on which the claims are based fail to plead fraud with particularity, because some are time-barred, and because others fail to allege causation or even injury, the Eighth and Ninth causes of action are dismissed as against all moving defendants.

D. Negligence and Negligent Misrepresentation (Tenth and Eleventh Causes of Action)

The elements of a state law claim for negligent misrepresentation are similar enough to claims for actual and constructive fraud that the analysis above need not be repeated.[79] The primary difference between the fraud and

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[79] "The elements of a cause of action for negligent misrepresentation are:

1. The defendant must have made a representation as to a past or existing material fact;

2. The representation must have been untrue;

3. Regardless of his actual belief the defendant must have made the representation without any reasonable ground for believing it to be true;

The elements of a state law claim for negligent misrepresentation are similar enough to claims for actual and constructive fraud that the analysis above need not be repeated.[79/] The primary difference between the fraud and negligent misrepresentation claims is that in order to state a negligent misrepresentation claim, the plaintiff need not allege that the defendant knew the falsity of the misrepresentation. It is enough that the defendant made it without reasonable belief. Christiansen, 231 Cal. Rptr. at 75. This difference is not sufficient to cause the Court to reach a conclusion with respect to this claim that is any different than that reached-with respect to the fraud claims.

More importantly, the outcome with respect to this claim is dictated by the Application of the two year statute of limitations respecting negligent misrepresentation claims. See

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[79]"The elements of a cause of action for negligent misrepresentation are:

1. The defendant must have made a representation as to a past or existing material fact;
2. The representation must have been untrue;
3. Regardless of his actual belief the defendant must have made the representation without any reasonable ground for believing it to be true;
4. The representation must have been made with the intent to induce plaintiff to rely upon it;
5. The plaintiff must have been unaware of the falsity of the representation; he must have acted in reliance upon the truth of the representation and he must have been justified in relying upon the representation.
6. And, finally, as a result of his reliance upon the truth of the representation, the plaintiff must have sustained damage."

Christiansen v. Roddy, 231 Cal. Rptr. 72,75 (Cal. App. 5 Dist. 1986) (citations omitted).

e.g., Continental Motion Pictures v. Allstat Film Co., 590 F. Supp. 67, 72 (C.D. Cal. 1984); David K. Lindemuth Co. v. Shannon Fin. Corp., 660 F. Supp. 261, 264 (N.D. Cal. 1987). But see Donoghue v. Orange County, 848 F.2d 926, 930 (one year statute of limitations applied to negligent misrepresentation action). Because all of the alleged misrepresentations occurred more than two years before the action was filed, all claims for negligent misrepresentation are time-barred.

Plaintiffs' Tenth Cause of Action for Negligence pleads no more than plaintiffs' Eleventh Cause of Action for Negligent Misrepresentation. The Supreme Court has stated:

> To say . . . that a claim arises out of 'negligence' rather than 'misrepresentation' when the loss suffered by the injured party is caused by a breach of . . . the duty to use due care in obtaining and communicating information upon which that party may reasonably be expected to rely in the conduct of his economic affairs, is only to state the traditional and commonly understood definition of the tort of 'negligent misrepresentation."

United States v. Neustadt, 366 U.S. 696, 706 (1961) (finding that a claim was one arising out of misrepresentation and thus was not actionable against the government under the Tort Claims Act). The negligence claim here alleges:

> As a result of their actions and conduct as alleged herein, defendants . . . made and/or caused to be made or were negligent in failing to make or causing to be made or corrected certain statements . . . which defendants knew,

> or should have known after reasonable inquiry . . . were not accurate.

Complaint at 142-44.

Clearly, the allegations of negligence arise out of misrepresentation. Moreover, the negligent misrepresentation claim, asserted as the eleventh cause of action, is virtually identical and this claim adds nothing to it. Thus, this claim is deficient on the same grounds as the claim, for negligent misrepresentation.

E. False and Misleading Advertising (Twelfth Cause of Action)

This claim against Post, Boyle, Harrison, Glupker and Nussbaum under Cal. Bus. & Pro. Code § 17500 et seg. fails to state a claim. In Chern v. Bank of America, 127 Cal. Rptr. 110, 115 (1976), the court held that the statute in question does "not authorize recovery of damages by private individuals. Private relief is limited to the filing of actions for an injunction." While recently a California Court of Appeal has noted ambiguity in the case law[80], the Ninth Circuit has agreed with Chern, holding that the statute "authorizes no compensatory damages for *3* private parties. "E.W. French & Sons, Inc. v. General Portland Inc., 885 F.2d 1392, 1402 (9th Cir. 1989). Xerox Corp. v. Apple Computer, Inc., 734 F. Supp.

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[80] See Bank of the West v. Superior Court, 277 Cal.Rptr. 219, 228 (Cal. App. 1 Dist. 1991) rev'd on other grounds, _ Cal. Rptr. 2d _,61 U.S.L.W. 2102 (1992) (noting ambiguity in 1983 Cal. Supr. Ct. decision which declined to decide whether "a plaintiff other than a business competitor can recover damages on a cause of action based on the unfair competition or false advertising law." (quoting Committee on Children's Television, Inc. v. General Foods Corp., 197 Cal. Rptr. 783, 794 (1983)).

1542, 1550 (N.D. Cal. 1990) (damages not available to private plaintiffs). This claim is insufficient as a matter of law

F. State Securities Law Violations (Thirteenth Cause of Action)

This claim against Post, Boyle, Harrison, Glupker and Nussbaum is, for all practical purposes, incomprehensible. Certainly the least that can be expected of a pleading is that it state the particular statute under which defendants are said to be liable. This claim refers to virtually all of the California state securities laws, without specifying those for which defendants are actually alleged to be liable. If the aim of establishing pleading requirements is to ensure that each defendant be able to prepare an adequate answer, this claim must fail. Worlds of Wonder, 694 F. Supp. at 1432.

Even if the claim were viewed as intending to charge defendants with a violation of Cal. Corp. Code § 25401,[81] it fails to state a claim against Post, Boyle, Harrison, Glupker and Nussbaum. As explained above, the claims based on misrepresentations alleged to have been made prior to November 3, 1987 are time-barred.[82] The misrepresentation

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[81] This section reads as follows:

It is unlawful for any person to offer or sell a security in this state or buy or offer to buy a security in this state by means of any written or oral communication which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

[82] Cal. Corp. Code § 25506 requires that a civil action for damages under § 25401 must be brought "before the expiration of four years after the act or transaction constituting the violation or the

relating to the timing of the real estate losses are immaterial[83], and the remaining misrepresentations were not 8 made during a period when any representative plaintiffs bought GFC securities. Plaintiffs are no more successful on their state securities claims against Post, Boyle, Harrison, Glupker and Nussbaum than they were on their federal claims.

V. CONCLUSION

In assessing plaintiffs' argument that they should be given another chance to amend because they have not had a sufficient opportunity to discover what the facts are, the Court must give some weight to the past history of all the litigation involving "the facts". It is certainly clear that plaintiffs' counsel has pleaded the GFC facts for different plaintiffs a number of times in a variety of ways, but it is clearer still that the facts are always the same. The ingredients do not vary. They are just cooked up differently. The Court has been somewhat slow to recognize this because of the increasingly lengthy and disorganized method of pleading employed here. That method of pleading now appears to have been employed deliberately, with an intent to impede any clear analysis of the chronology of events involved, or the claims being alleged based on these events. The plaintiffs have scattered allegations randomly throughout the 154 page complaint in what now appears to be a conscious effort to obscure any recognition by

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expiration of one year after the discovery by the plaintiff of the facts constituting the violation, whichever shall first expire." (Emphasis added.) Therefore, with respect to those misrepresentations made before the November 3 1987 disclosures, suit would have had to have been brought by November 3, 1988

[83] See Toombs v. Leone 777 F.2d 465, 470 (9th Cir. 1985) (under California securities laws, plaintiff must prove materiality of misrepresentations and omissions).

the court that their claims, once isolated and analyzed, are either 18 time-barred or substantially without -merit.

In response to the motions to dismiss attacking the Second Amended Complaint, plaintiffs' counsel not only asked leave to amend, but also asked leave for other representative plaintiffs to intervene to save this case as a class action. The motion to intervene was in effect plaintiffs' counsels principal opposition to the motions to dismiss. Taking first then, the question of the propriety of intervention, it is an established principle that a "third party cannot intervene pursuant to Rule 24 of the Federal Rules of Civil Procedure in a class action suit to save a claim as to which the original plaintiffs never had a claim 'for the intervenors cannot possibly have a claim or defense in common with a plaintiff who never had a claim'." Turner v. First Wisconsin Mortgage Trust, 454 F. Supp. 899, 913 (E.D. Wisc. 1978) (quoting Washington v. Wymaii, 54 F.R.D. 266, 272 (S.D.N.Y. 1971). Thus, the proposed intervenors cannot be permitted to save this litigation as a class action as to defendants against whom there were never any viable claims. These plaintiffs have no such federal claims against the defendants who are now being dismissed from all of the claims in the Second Amended Complaint. Even if they had viable federal claims, looking at their trading history, these plaintiffs were unlikely to be qualified as representatives of a class as to any claims against the dismissed defendants. Nevertheless, it may be that a very narrow class could be defined with respect to the federal claims the Court has not dismissed against the remaining defendants. The Court does not foreclose that possibility until all parties have had an opportunity to be heard. The Court is convinced, however, that the requisite finding of commonality could never be made with respect to any state law claim alleged in the Second Amended Complaint.

As to the propriety of amendment, it cannot be disputed that plaintiffs' counsel has been litigating these same issues for a long time, and he knows a lot about the facts. That of course does not in any way foreclose his clients from proceeding with their case because their counsel's knowledge is obviously not necessarily imputed to them. It does however reflect on the credibility of counsels protestations that he cannot plead these plaintiffs' claims more coherently than he has because he has had no discovery. It also reflects on the credibility of his earlier assertions that these two plaintiffs are suitable class action representatives. In light of his pleadings in prior cases it is somewhat disingenuous for plaintiffs' counsel to tell the Court that he did not know the facts until immediately prior to November 16, 1990. If the plaintiff in Weinberger could plead the facts on November 17, 1987, based on the earlier October/ November 1987 disclosures, why couldn't these plaintiffs do so in the three year period that followed those disclosures? An examination of the 16 chronology of events involved here invites conjecture as to why these plaintiffs waited so long.

As discussed, plaintiffs have stated a narrowly circumscribed proxy fraud claim based on the 1987 proxy material against some of the moving defendants. There are also a number of other defendants still remaining in the case. Therefore, although the Court is doubtful that these plaintiffs will ever be found qualified to represent a class with respect to the claims against the remaining defendants, that decision can be made at a later time. Thus, as to any defendant against whom all of the claims in the Second Amended Complaint have not been dismissed with prejudice the Court will consider permitting plaintiffs to amend the claims they have already alleged. The Court has found that some of these claims are wholly without legal merit and cannot be amended, but as to the others, the Court does not wish to deny the plaintiffs their day in court. Nevertheless, no leave will be granted to state

other claims not now included in the Second Amended Complaint.[84] At some point the litigation over these issues must be brought to a conclusion. The Court has an obligation to see to it that point is reached within a reasonable time frame.

DATED: September 8, 1992

/s/MARIANA R. PFAELZER
Mariana R. Pfaelfier
United States District Judge

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[84] The Court recognizes that class action complaints based on securities law violations are often framed so as to allege everything possible against every person possible. This enhances the chances of settlement, of course, but the federal rules do not permit plaintiffs to plead their case differently depending on whether they are ultimately going to settle it or try it.

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OFFICE OF THE CLERK

Supre

October Term, 1998

JOHN GLAVARIS AND PATRICIA GLAVARIS; BENNY L. TOLLEY; JOEL BINDER; MARIT FIDEL; BERNARD FIDEL,
Petitioners,

vs.

HERBERT J. YOUNG; JAMES N. THAYER; JAY JANIS; JOHN R. WILLIAMSON; MICHAEL W. MOONEY; LYNNE CRAWFORD; LINDA K. S. BLOUNT; ROBERT R. SPRAGUE; HOUSTON I. FLOURNOY; BERNICE HUTTER; MELVIN P SPITZ; RAFAEL E. VEGA; GIBRALTAR SAVINGS; GIBRALTAR, F.A.; MELVIN RIFKIND; GIBSON DUNN & CRUTCHER; KPMG PEAT MARWICK; ALVIN KANG; ERNST & WHINNEY; ERNST & YOUNG; WILLIAM H. DUDLEY; MELVIN RIFKIND; RIFKIND, PONDEL & PARSON; KENNETH LEVENTHAL & COMPANY; RICHARD SPRAYREGEN; FEDERAL DEPOSIT INSURANCE COMPANY, as Receiver for Gibraltar Savings, F.A.
Respondents.

Petition For Writ Of Certiorari

APPENDIX

Volume II

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APPENDIX B:	Order of the United States Court of Appeal for the Ninth Circuit dated June 2, 1998 denying rehearing
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APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOHN GLAVARIS AND PATRICIA GLAVARIS;
BENNY L. TOLLEY in their individual
capacities and on behalf of
all persons similarly situated
Plaintiffs

v.

HERBERT J. YOUNG, et al.,
Defendants

CASE NO. CV-90-6185 MRP

J. BINDER, BERNARD FIDEL, DAVID FIDEL, MARIT
FIDEL, ERIK FIDEL AND HILDA FIDEL
in their individual capacities and on
behalf of all persons similarly situated
Plaintiffs,

v.

Herbert J. Young, et al.
Defendants.

CASE NO. CV 92-5715 MRP

SECOND MEMORANDUM OF DECISION

FILED AUGUST 11, 1994
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

This is the Court's Second Memorandum of Decision ("Second MOD") in the Glavaris et al. v. Young et al. ("Glavaris") action. On September 10, 1992 this Court issued a lengthy Memorandum of decision ("MOD") in response to motions to dismiss the Glavaris Second Amended Complaint (the "Glavaris Complaint") filed by defendants Richard M. Post ("Post"), James R. Boyle ("Boyle"), Dean W. Harrison ("Harrison"), Jerome Nussbaum ("Nussbaum"), Rifkind Pondel & Parsons, and Melvin Rifkind, (collectively "Rifkind"), William H. Dudley, Ernst & Whinney, Ernst & Young (collectively "Ernst"), KPMG Peat Marwick,[1] Alvin Kang (collectively "Peat"), Gibson, Dunn & Crutcher ("Gibson") and Warren P. Glupker ("Glupker") (collectively "Glavaris Moving Defendants"). In the MOD, the Court granted in part and denied in part the motions of certain defendants and granted the motions of others in their entirety.[2]

On February 18, 1994, the Court took under submission the motions to dismiss filed by the remaining defendants in Glavaris, as well as the motions to dismiss the

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[1] The firm was formerly known as Peat, Marwick, Mitchell & Co. and Peat Marwick Main & Co.. Glavaris names all of the entities as defendants.

[2] As stated in the MOD, "Since this is the third complaint filed by plaintiffs and they have been given many opportunities both to plead and to argue their theories, legal and factual, further amendment will be permitted only as indicated below. Except as specifically indicated, all claims ordered dismissed by this Memorandum are dismissed with prejudice." MOD at 2.

First Amended Complaint in Binder et al. v. Young et al. ("Binder" or the "Binder Complaint"), a related case that was filed twelve days after the Court filed the MOD. In this Second MOD, which picks up where the first MOD left off, the Court grants the motions of certain defendants, and clarifies what issues and claims remain in each of the cases.[3] Except where specifically indicated the court's MOD remains the law of the case and those claims that were dismissed in Glavaris remain dismissed with prejudice. The claims dismissed in the Second MOD are also dismissed with prejudice. As the Court has previously advised plaintiff's counsel, Robert Bretz ("Bretz"), at some point the litigation over these issues must be brought to a conclusion. This decision will bring the parties much closer to that point.

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[3] In analyzing the motions to dismiss, the court has considered matters outside the pleadings, as well as matters subject to judicial notice, and treated the motions as ones for summary judgment. The court considered a copy of the Gibraltar Financial Corporation ("GFC") press release dated October 30, 1987 as well as evidence of newspaper reports and other evidence relating to GFC's October 1987 disclosure of its losses. The Second MOD refers to allegations and arguments made in actions filed in the Central District of California and the Superior court in California relating to the same events as those involved in the Glavaris and Binder actions. The complaints filed in several of these actions were submitted to the Court by various parties as part of the record. The Court also requested files from the Clerk of the Central District and has made reference to them.

DISCUSSION

I. FACTUAL BACKGROUND

A. Prior to the filing of the Glavaris action

The Glavaris and Binder actions are two in a series of cases arising from Gibraltar Financial Corporation's (IIGFCII) real estate developments, joint ventures and bond market transactions which resulted in its $150 million loss for the fiscal quarter ended September 30, 1987 and its additional losses thereafter.[4/] Litigation involving similar facts and allegations has been ongoing since May of 1987. A careful analysis of the litigation history which culminated in the filing of the Glavaris and Binder actions is critical to understanding the Court's ruling an the motions to dismiss.[5] In assembling this chronology, the Court has taken into consideration cases filed in this Court and before other judges in the Central District and in the Superior Court of California. The Court has compared allegations from the various complaints and attempted to arrive at a consistent

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[4/] Gibraltar savings is currently under the control of the Resolution Trust Corporation ("RTC") and is a defendant in both Glavaris and Binder. GFC is in bankruptcy proceedings and is not named in either of these suits. The term "Gibraltar, is used throughout the Glavaris and Binder complaints without specification of whether the acts alleged were the acts of the parent or the subsidiary.

[5] The Court has developed a time line which sets forth the key events important to the motions in both Glavaris and Binder.

statement of "facts. Unless otherwise indicated, the "allegations" in this chronology are taken from the Glavaris Complaint.

A central focus of the events involved in the various lawsuits involving GFC, Gibraltar Savings, and their officers and directors is the "Gallaria,"[6] a commercial real estate property which was located in Metairie, Louisiana which was owned by Gibraltar Management of Properties, Inc. ("GMOP"), a wholly owned subsidiary of Gibraltar Savings. In 1983 Gibraltar Community Builders, Inc. ("GCBI"), a California Corporation with its principal place of business in Stockton, California, and GMOP formed Gibraltar Community Builders ("GCBI"), a California partnership, to develop real estate properties.[7] In the partnership agreement, GMOP was referred to as the "financial partner" and GCB as the "developer." The project

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[6] In fact, the majority of the allegations of wrongdoing by defendants concern fraudulent representations and mismanagement of the Galleria and "other" real estate investments (none of which are specifically identified in the complaint). For example, in paragraph 76 of the Glavaris Complaint where plaintiffs list "fraudulent and false and misleading omissions." of the 45 subsections, at least 24 concern the Gallaria and real estate investments. See Glavaris Complaint at 90-103.

[7] Glavaris plaintiffs' request for judicial notice filed December 10, 1993: Exhibit G: Gibraltar community, Gibraltar Management of Properties, Inc. at 3 ("GCBI Complaint").

manager of the Galleria was GCBI.[8] By 1985, GFC's largest real estate investment was in GCB, and its largest real estate development project was the Galleria. More than $530 million was invested in GCBI and the Galleria.

The events critical to the claims alleged in the various GFC and Gibraltar Savings actions began in January 1986 when GFC published its 1985 Annual Report stating that the "outlook ... in 1986 is favorable" and that the company expected continued asset growth and another successful year. The Form 10-K filed with the Securities and Exchange Commission ("SEC") at that time stated that

> [Gibraltar's] real estate investments are carried at the lower of cost or net realizable value. Met realizable value is determined quarterly based on estimated sales value less estimated expenses and carrying costs through completion and sale of the project. Estimated sales values are based on independent appraisals or comparisons with sales prices of similar properties. Estimates of expenses and carrying costs are based on historical experience adjusted for factors such as anticipated inflation [and] cost of funds.

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[8] GCBI at 4.

The three officers, directors and shareholders of GCBI are: Corey Patick, Hal Lurtsema, and Myron Stahl.

Ernst audited GFC's 1985 financial statements[9] and issued an opinion dated January 23, 1986 stating that they conformed with generally accepted accounting principles ("GAAP") applied on a consistent basis.[10]

In August 1986, Peat replaced Ernst as GFC's auditor. It is alleged that GFC learned that an appraisal of the Galleria would reflect a loss in excess of $30 million. Upon learning of the appraisal, it is alleged that GFC, through Jerome Nussbaum ("Nussbaum") cancelled the appraisal and failed to disclose this information about the Galleria to the holders of GFC's stock and debentures. In January 1987, GFC issued its year-end press release which reported "record earnings" for the year ending December 31, 1986 and a "50% dividend increase." Also, the 1986 Annual Report stated that "results for 1986 include provisions for loan losses of $34 million and losses on real estate operations of $33 million. As a result, there will be a substantial reduction in such provisions in

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[9] The financial statements are the consolidated statements of GFC and its subsidiaries, including Gibraltar Savings.

[10] The 1985 financial statements and representations regarding the reporting of real estate also appeared in the April 7, 1986 Prospectus covering the offer and sale of Gibraltar Saving's 7-1/2% Convertible Subordinated Dentures due 2006 ("Gibraltar Savings 7-1/2") and the December 15, 1986 Prospectus covering the offer and sale of GFC's 13-7/8% Senior Subordinated Debentures due 2001 ("GFC 13-7/8").

1987 and beyond and a positive effect on operating earnings."[11]

It is also alleged that GFC was informed in February 1987 that a Los Angeles law firm, Dorman and Wheeler, was investigating a claim of misfeasance by GFC'S officers and directors regarding the development of the Galleria. In March 1987 GFC issued its 1986 financials with an opinion by Peat stating that the financials conformed with generally accepted accounting principles applied on a consistent basis.[12] In late February or early March of 1987, at a meeting at Gibraltar Savings' headquarters, the officers and directors of GCBI threatened litigation against Gibraltar Savings because of its refusal to contribute the Gallaria to GCB.[13] Bretz was present at that meeting.[14] By March

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[11] Jerome Nussbaum served as Executive Vice President and Chief Financial officer of GFC, and President and Chief operating Officer of Gibraltar savings.

[12] Ernst's opinion dated January 23, 1996 was republished and included with the 1986 Annual Report to shareholder and Form 10-K.

[13] Declaration of Martin C. Washton Filed in Opposition to Plaintiff's Second Motion for Partial Summary Judgement in Nuebronner v. Young et al. at 17-18 (filed November 5, 1990) (deposition testimony of Dean W. Harrison taken October 20, 1990) ("Washton Declaration").

On December 10, 1993, Bretz filed a Declaration in Support of Plaintiff's Opposition to Defendant RTC/Gibraltar

1987, litigation had commenced in Metairie, Louisiana concerning the right to control and possession of the Galleria.[15] On March 13, 1987, an action was filed in Stockton, California by GCBI against GMOP and Gibraltar Savings in which GCBI alleged that the failure of GMOP and Gibraltar Savings to contribute the Galleria to GCB constituted a breach of duty to the partnership. Bretz was involved in representing the principal stockholders of GCBI in that case.[16]

In April 1987, a second version of GFC'S 1986 financials was issued and included with the Proxy Statement sent to the shareholders for the 1987 Annual Meeting of

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and the Gibraltar Officer/Director Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint [in Glavaris] ("Bretz Declaration"). Although Bretz filed the declaration in an attempt to cast doubt on Washton's declaration and on the accuracy of the Court's summary of events in fact his declaration only further demonstrates the degree of involvement he had in the events surrounding Gibraltar Savings and GFC over the last ten years. Moreover, as stated in the MOD at 8 fn.16, the Court did not rely on Washton's declaration in reaching the decisions in the MOD. Rather, these allegations and testimony are cited for the purpose of evaluating Bretz' representations as to the necessity for further discovery to permit him to file an adequate pleading. These allegations are also cited to develop the general background of the cases before the Court.

[14] Washton Declaration at 18.

[15] Id. at 19-20.

[16] Id. at 20-21.

Shareholders. This version of the financials treated the Galleria as a long-term investment. At the Annual Meeting, the shareholders were asked to approve a retroactive agreement indemnifying CFC's officers and directors for any claims which might be brought against them for mismanagement, as well as any claims which might arise out of the acquisition of First State Bank of Florida ("FSBF"). The Proxy Statement for the Annual Meeting to be held in May recited that the Board was not aware of any actions currently pending or threatened against any directors or officers of GFC who might become parties to the indemnity agreement.

On May 14, 1987 Bretz filed a lawsuit in the Central District of California for injunctive relief based on the unlawful solicitation of proxies for the 1987 Annual Meeting. Stahl v. Gibraltar Financial Corporation, No. CV 87-3147 MRP. In that lawsuit, Stahl, as an individual, alleged that GFC had failed ' to disclose that a law firm, Dorman and Wheeler, had been investigating claims of malfeasance and misfeasance by GFC's officers and directors, involving, among other things, the Galleria, and also that GFC was aware of threatened litigation against officers and directors who were potential parties to the indemnity agreement[17]. Despite the filing of the Stahl case, the May 22, 1987 Annual Meeting was held and, at that meeting, Young stated that

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[17] On July 14, 1989, this Court granted judgment for the defendants in Stahl on the ground of lack of standing to sue. on June 18, 1992, the Ninth Circuit reversed this Court's decision. On March 15, 1993, this Court hold a status conference to discuss how the Stahl action would proceed. Bretz did not appear at that conference, nor has he taken any additional action on that case. Nevertheless, he continues to pursue similar proxy claims in the Glavaris action.

GFC was in sound financial condition and that its future prospects were favorable. During the summer of 1987, GFC secured the permission of the FHLBB to purchase FSBF for $116 million.

In October of 1987 it is alleged that the FHLBB told GFC that it found the institution to be in financial trouble with an unrealized loss of $500 million resulting from its substantial portfolio of fixed rate mortgage-backed securities[18]. On October 30, 1987, the investment community was shocked by GFC's disclosure of a loss of $154.6 million in the third quarter ending September 30, 1987. This was one of the largest quarterly losses ever announced by a public thrift institution. GFC acknowledged the loss as resulting from commercial banking enterprises and high-risk real estate acquisitions, and stated in its press release:

> GFC has commenced a program to expedite the sale of real estate investments and has provided for anticipated losses on sale. . . .

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[18] The Glavaris plaintiffs allege that Gibraltar did not take steps to eliminate or reduce its exposure to a rising interest rate environment and thus suffered losses from these investments. This allegation is, at most, a claim of negligence by Gibraltar officials.

> This decision . . . required a $147.1 million third quarter writedowns.[19]

GFC suspended its quarterly dividend, its credit rating was lowered and it was forced to put up one of its principal assets, the MoneyCenter, for sale in order to raise capital. On November 2, 1987, The Wall Street Journal[20] and New York Times[21] reported the news of these catastrophic losses and the price of GFC stock plummeted.

On November 17, 1987, a stockholders' derivative lawsuit was filed in the Superior Court of the State of California in Los Angeles County for breach of fiduciary duty, breach of contract and for damages against GFC's directors, officers and outside accountants. Weinberger v. Gibraltar Fin. Corp., No. C668149. Bretz was not involved in that lawsuit. The Weinberger complaint alleged that the defendant officers and directors, aided and abetted by their outside auditors, breached their fiduciary duty to GFC and its shareholders by negligently investing GFC's assets in high risk real estate investments, bonds and commercial loans, which ultimately resulted in a loss in excess of $154 million recognized in the third and fourth quarters of 1987. On October 4, 1988, the Superior Court entered a final judgment that approved a settlement of the action and granted dismissal

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[19] GFC Press Release (October 30, 1987).

[20] See David Hilder, Gibraltar Posts a Big Deficit for 3rd Quarter, Wall St. J., November 2, 1987, § 1, at 13.

[21] Gibraltar Loss of $155 Million, N.Y. Times, November 2, 1987 at BIO.

with prejudice of all claims in the Weinberger action against the past, present, and future officers, directors, accountants, and agents of GFC, and GFC itself. Under the terms of the settlement, GFC received approximately $800,000 from the directors and officers' National Union Fire Insurance ("National Union") policy. Additionally, under a plan of reorganization recommended by a Special Litigation Committee, Herbert J. Young ("Young") retired as Chairman and Chief Executive officer of GFC and Gibraltar savings, Jerome Nussbaum ("Nussbaum") resigned as President of Gibraltar Savings and Chief Financial Officer of GFC, and John Williamson ("Williamson") was reassigned to staff functions and was not renominated as a director of GFC. The Court has no evidence that any shareholders of GFC objected to the Weinberg settlement.[22]

Moreover, on November 23, 1987 and at various times thereafter, the following shareholder class actions were filed in the Central District of California: Model Assocs., Inc. v. Gibraltar Fin. Corp., No. CV 87-7876; Lifshitz v. Gibraltar Fin. Corp., No. CV 87-8156; Winard v. Gibraltar Fin. Corp., No. CV 881101; Greenman v. Gibraltar Fin. Corp., No. CV 88-1912: and Soidner v. Gibraltar Fin. Corp., No. CV 88-4551. On May 9, 1988, pursuant to stipulation of the parties, these actions were consolidated by this Court under the caption In re Gibraltar Fin. Corp. Sec. Litig., Master File No. CV 87-7876 MRP ("In re Gibraltar"). A Second Consolidated Amended and Supplemental Complaint was filed on May 1, 1989. That complaint defined the

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[22] On August 12, 1988, notice of settlement was sent to all shareholders of GFC common stock as of that date. The settlement notice required that shareholders who objected to the terms of the settlement file an objection before the hearing date on October 4, 1988.

class as purchasers of GFC common stock during the period January 23, 1986 through March 31, 1989 ("In re Gibraltar Class"), and named as defendants GFC, Young and Nussbaum.[23] The In re Gibraltar action sought relief for violation of Section 10(b) of the Securities Exchange Act of 1934 ("Section 10(b)") and Securities Exchange Commission Rule lob-5 ("Rule l0b-5"), fraud and deceit, and negligent misrepresentation (collectively "In Re Gibraltar Claims"). The In re Gibraltar Claims were based on allegations that the defendants had failed to make adequate provisions for losses and timely write-downs of commercial loans, real estate and bond investments; failed to make adequate provision for losses and timely write-down of loans and properties acquired in settlement of loans to their realizable value; and failed to timely and adequately disclose losses and the risky nature of GFC's investments.

By the end of 1987, it is alleged that GFC suffered unreported losses attributable to the decline in market value of its portfolio of fixed rate mortgage-backed securities in excess of $300 million and that at that point its net worth consisted primarily of intangible good will. It is further alleged that in December 1987, GFC's management met with the FHLBB to discuss the FHLBB's concerns about the financial condition of the company, but that nevertheless, in

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[23] The end date for the class period was extended from November I 1987 to March 31, 1989 based upon new allegations raised in the Second Amended Complaint, including that (1) additional losses from all of the activities previously disclosed had continued for each quarter through March 31, 1989, and (2) previously unidentified bond market investments led to losses commencing in the third quarter of 1987 for which defendants did not make timely and adequate disclosures.

January 1988, GFC issued a press release stating that it was in sound condition, that capital ratios of its savings and loan subsidiaries remained in excess of regulatory requirements, and that 1988 should be a profitable year.[24]

In March 1988, Young, Williamson and Nussbaum retired. Further, in that month, the 1987 GFC financial statements were issued with an opinion from Peat stating that they conformed with GAAP applied on a consistent basis. At that time, GFC closed the MoneyCenter necessitating a $20 million write-off.

In April 1988, a proxy statement was sent to all shareholders. The Glavaris Complaint alleges that the statement did not disclose the claims brought against GFC'S management, the FHLBB criticisms of GFC's management, and the FHLBB's concerns with respect to the financial well-being of GFC.[25] In May 1988, at the Annual Meeting, Thayer reported that GFC's condition had stabilized, no additional major surprises were expected, and GFC expected to make a profit by the fourth quarter of 1988. A Notice of Settlement, dated August 12, 1988 and issued by Gibson

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[24] These allegations also appear in the In re Gibraltar Second Consolidated Amended and Supplemental Complaint filed on May 1, 1989.

[25] Plaintiffs allege no specific vote which was affected by these alleged omissions in the 1988 Proxy Statement.

behalf of the Special Committee,[26] reported that the committee had not found any evidence of wrongdoing on the part of GFC's management. As stated, GFC settled the Weinberger shareholder derivative suit in September 1988.

By January 1989, GFC was publicly reported to be in an "unsafe and unsound" condition. The 1988 financial reports, issued in March 1989, showed a loss of $101 million. On March 10, 1989, the Mercatura Trust filed[27] an action against Drexel Burnham Lambert.[28] Mercatura Trust v.

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[26] This committee was established by Gibraltar to investigate the allegations of the Weinberger derivative action.

[27] Dieter Neubronner is the trustee of the Mercatura Trust ("Neubronner"). Neubronner was the largest single shareholder of GFC. Neubronner allegedly lost $ 7.5 million in connection with his purchase and sale of GFC common stock.

[28] In the Glavaris Complaint, plaintiffs allege that Gibraltar Savings had purchased a substantial portfolio of "junk" bonds from Drexel Burnham Lambert and that one or more of Gibraltar's executives had received undisclosed compensation from these. Glavaris Complaint 176(37) at 101. There are no facts pleaded to support this allegation. Furthermore, such an allegation, along with plaintiffs' general allegations of mismanagement, are derivative in nature since they result in injury to the corporation and therefore must be brought in the name of the corporation. See Stevens v. Lowder, 643 F.2d 1078, 1079-80 (5th Cir. 1981). Any relief based upon such alleged wrongdoing belongs to the RTC and thus, plaintiffs do not have standing in this action to assert

Drexel Burnham Lambert Inc., No. CV 89-1461. Bretz again represented the plaintiff in that action before Judge Richard A. Gadbois, Jr.. In Mercatura Trust, plaintiff alleged insider trading by Drexel Burnham Lambert and Michael Milken based on non-public information concerning the Galleria. The period of insider trading was alleged to have ended on October 30, 1987 when GFC reported the real estate investment and loan losses of a quarter billion dollars.[29] Plaintiff alleged in the Mercatura Trust case that after October 30, 1987 the inside information was "out." After allowing plaintiff six opportunities to state his claim with sufficient particularity, the district court dismissed the fifth amended complaint with prejudice for failure to satisfy the contemporaneous trading requirement, and for failure to satisfy Federal Rule of Civil Procedure 9(b). The Ninth Circuit affirmed, Neubronner v. Milken, 6 F.3d 666 (9th Cir. 1993), noting that "the district court's decision to dismiss the fifth amended complaint with prejudice was appropriate in light of Neubronner's repeated failure to cure the deficiencies in his pleadings." Id. at 672.

On March 30, 1989 the Federal Savings and Loan Insurance Corporation ("FSLIC") was appointed conservator of Gibraltar Savings. It is alleged that GFC continued to deny any wrongdoing, even in the face of this action by the FSLIC. In April 1989, Gibson reconfirmed what was stated in the Notice of Settlement of Weinberger, that the Special

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such claims. See Leach v. FDIC, 860 F.2d 1266, 1269 (5th Cir. 1988), cert. denied, 491 U.S. 905 (1989).

[29] Mercatura Trust Complaint at 7 ¶ 24.

Committee found no wrongdoing by GFC's officers and directors.

On June 2, 1989, Neubronner, again represented by Bretz, filed another lawsuit in this Court against GFC and its officers, directors and accountants, among others. Neubronner, as Trustee for and on behalf of Mercatura Trust v. Young, No. CV 89-3377 MRP ("Neubronner"). Neubronner alleged violations of the federal securities laws and RICO, together with several supplemental state claims based on misrepresentations and omissions, as well as mismanagement by GFC and its officers directors and accountants for the period January 1, 1986 through April 1, 1989. In this lawsuit, before this Court, Bretz characterized the October 30, 1987 losses reported by GFC as "catastrophic operating losses of approximately $250,000,000 (one quarter of a billion dollars!) attributable to the Company's prior real estate loan and investment activities. The Company's stock price dropped to approximately $3."[30]

Bretz further alleged that "management was aware of massive losses attributable to the Company's real estate loan and investment activities and portfolios aggregating approximately $250,000,000 which catastrophic and terminal losses were first publicly reported on or about November 3, 1987 (based on GFC Managements' Press Release dated Friday, October 30, 1987)."[31] (Emphasis added throughout.) As Neubronner himself stated in a declaration filed in the case:

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[30] Neubronner Complaint at ¶ 6.

[31] Neubronner Complaint ¶ 31(11) at 41-42 (emphasis added).

> Mercatura Trust was still purchasing shares of GFC Common Stock, and had accumulated a position of approximately 1,028,000 shares of GFC Common Stock, in early November of 1987 when I personally first heard about GFCIS horrible real estate losses of about U.S. $250,000,000 as announced by GFC and Gibraltar Savings in the U.S. on or about October 30, 1987.
>
> I immediately caused Mercatura Trust to stop purchasing GFC stock after I first learned about these very large losses attributable to Gibraltar Savings' commercial and real estate investments.[32]

The complaint in Neubronner also recited that "[i]n January of 1989, the Federal Home Loan Bank Board of San Francisco declared GFC to be in an 'unsafe and unsound' condition and effectively seized control and management of the Company's savings and loan business. . . . [by] April 3, 1989, the Wall Street Journal reported that the Government's takeover of Gibraltar confirms that GFC's shareholders have been 'wiped out'!"[33]

A short time after the Neubronner case was filed, additional cases were brought in the Central District against GFC, Gibraltar Savings and related entities alleged to be

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[32] Declaration of Plaintiff D. Neubronner in Support of Motion for Summary Judgment Against Gibraltar savings and GFC Officer/Director Defendants in Neubronner v. Young, at 5 (October 10, 1990).

[33] Neubronner Complaint 7 at ¶¶ 13, 15.

involved in various ways in the Gibraltar losses. These cases include Neubronner v. Waldrop, No. CV 89-3529, and Gibraltar v. FHLBB, No. CV 89-3489l both before Judge William D. Keller in the Central District. These cases challenged the FSLIC's conservatorship of Gibraltar Savings and Gibraltar Savings Bank as unlawful. Bretz represented the plaintiffs in Neubronner v. Waldrop.[34]

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[34] The MOD states that Bretz represented the plaintiffs in Gibraltar v. FHLBB as well. Bretz argues that he has "no recollection of representing a plaintiff in Gibraltar v. FHLBB and that his office "has no record of [his] having represented the plaintiff in such case." Bretz Declaration at 11. Accordingly, the Court assumes that Bretz did not represent the plaintiffs in that case. However, whether Bretz was "involved" in that matter is still unclear.

Plaintiff Neubronner, through his attorney, Bretz, has made many inconsistent allegations concerning the condition of Gibraltar Savings in these various actions. For example, in Neubronner v. Young, plaintiff alleged that Gibraltar was in an unsafe and unsound condition allegedly due to the fraudulent mismanagement of Gibraltar. Many of the same allegations are raised in this action. However, in Neubronner v. Waldrop, plaintiff alleged that although the "reason stated for the seizure . . . of Gibraltar Savings and Gibraltar Savings Bank by the government was . . . that Association[s] had incurred substantial dissipation of its assets and earnings due to violations of law, rules, regulations and to unsafe and unsound practices and is in an unsafe and unsound condition to transact business," the Associations are "not in an unsafe and unsound condition to transact business." Waldrop complaint 2-3 at ¶ 31 4-5 at ¶¶ 8-9 (emphasis added). In fact, plaintiff alleged in Waldrop that "the seizure of . . . [the Associations] by the government agencies was unlawful." Waldrop Complaint, 6 at ¶ 14.

On June 23, 1989, this Court certified a plaintiff Settlement Class in In re Gibraltar solely for purposes of the stipulation, the settlement contained therein and judgment. on July 28, 1989, John G. Glavaris filed a timely request for exclusion from the settlement class[35]. Neubronner, as trustee for Mercatura Trust, also opted out of the settlement class. Benny Tolley, a named plaintiff in Glavaris, was never a GFC common stock holder, and therefore could not have been a part of the In re Gibraltar Class. Similarly, Joel Binder, a named plaintiff in Binder, never held common stock in GFC and was never a part of the In re Gibraltar Class. Bernard Fidel, David Fidel, Marit Fidel, Erik Fidel and Hilda Fidel (collectively "Fidel"), all named plaintiffs in Binder, did hold common stock in GFC. Fidel did not opt out of the In re Gibraltar settlement and received approximately $250,000 in that settlement.

The settlement and final judgment of In re Gibraltar was entered on September 19, 1989. Under the terms of the settlement agreement, National Union and Lexington Insurance Company ("Lexington"), GFC's insurers for the periods October 14, 1987 to November 26, 1988, and November 26, 1988 to November 26, 1989, respectively, agreed to pay jointly $8.5 million in settlement of the claims that were asserted or might have been asserted by the In re

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[35] The Final Judgment in In re Gibraltar includes a list of all class members who opted out of the settlement. John G. Glavaris appears on that list. Because Patricia Glavaris did not own GFC common stock, she was not a member of the In re Gibraltar class and was ineligible for notice or recovery in that settlement.

Gibraltar Class against GFC, Young and Nussbaum.[36] As part of the settlement, the National Union 1987 policy was surrendered by GFC, and the parties agreed that all future claims involving the officers and directors would be made against the 1988 Lexington policy: this issue was an important subject raised and discussed at the settlement hearing in this Court on September 11, 1989. The settlement also specifically provided that Lexington would be responsible for all claims in the Neubronner v. Young action.

On June 12, 1990, Bernard Fidel wrote a letter to this Court asking that the Court investigate the terms of the In re Gibraltar settlement. In that letter, Fidel stated that 11[a]n additional 7-8 million dollars coverage was available through the insurance companies, namely Lexington Insurance, which was available-- withheld from the stockholder in the class action and not disclosed -- possibly from the court too. Lexington Insurance did contribute to the class action, but withheld 7-8 million dollars unknown to US." Fidel stated that Mr. Glassman, counsel for the In re Gibraltar plaintiffs, "did finally admit to me on the phone that the insurance companies had indeed had an additional 7-8 million dollars -- completely opposite what was told to the stockholders." The Court heard nothing more of the matter for three-and-a-half years.

B. The Glavaris claims and the prior rulings in the MOD

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[36] National Union contributed approximately $ 1.75 million in consideration of the release of the claims relating to losses in 1987. Lexington contributed approximately $ 6.75 million in consideration for the release of the claims relating to losses in 1988.

B. The Glavaris claims and prior rulings in the MOD

On November 16, 1990 Bretz filed the Glavaris action alleging multiple claims under the federal securities laws and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq., as well as supplemental state law claims against Gibraltar Savings[37], directors and officers of Gibraltar Savings, the directors and officers of Gibraltar Financial Corporation ("GFC")[38] and GFC'S attorneys,[39] accountants[40] and

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[37] Gibraltar Savings is a wholly owned subsidiary of Gibraltar Financial corporation ("GFC") and is currently under the control of the Resolution Trust Corporation ("RTC"). GFC is in bankruptcy proceedings and is not named in this suit. The term "Gibraltar" is used throughout the Glavaris Second Amended Complaint and the Binder First Amended Complaint, without specification of whether the acts alleged were the acts Of the parent or the subsidiary.

[38] Herbert J. Young, Chairman, CEO, President of Gibraltar until 3/88.

James N. Thayer, Board member, President of Gibraltar as of 3/88.

Jay Janis, Board member, Chairman of Gibraltar as of 3/88.

John R. Williamson, Board member, CFO, Executive vice President of Gibraltar.

Jerome Nussbaum, Executive vice President, CFO of GFC and President and COO of Gibraltar Savings

Michael W. Mooney, Treasurer: Executive Vice President, CFO of Gibraltar Savings.

Lynne, Crawford, Senior vice President and Controller

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of Gibraltar Savings, Vice President of Gibraltar Management of Properties, Inc. ("GMOPI"); Officer/Director of Gibraltar affiliates.

Linda K.S. Blount, Vice President-Investor Relations and Corporate Communications of Gibraltar.

Robert R. Sprague, Board member of Gibraltar

Houston I. Flournoy, Board member of Gibraltar.

Bernice Hutter, Board member of Gibraltar.

Melvin P. Spitz, Board member of Gibraltar.

Rafael E. Vega, Board member of Gibraltar.

Richard M. Post, Senior Vice President-Real Estate of Gibraltar savings.

James R. Boyle, Executive Vice President-Real Estate Lending

Warren P. Glupker, Chief Appraiser of Gibraltar Savings.

Susan Rawlings, CPA, Senior financial analyst in charge of accounting for real estate of Gibraltar savings.

Dean W. Harrison, Senior Vice President, General Counsel and secretary of Gibraltar Savings.

[39] Gibson.

[40] Ernst; Peat and Kenneth Leventhal & Co. and Richard Sprayragen, partner (dismissed with prejudice from action on July 29, 1991).

financial public relations advisor.[41]

The Glavaris class is defined as individuals who purchased GFC "securities" between January 1, 1986 and April 30, 1989 and all GFC shareholders who received GFC's Proxy Statements dated April 6, 1987 and/or April 8, 1988. The complaint does not differentiate between purchasers of stock and debentures.[42] John G. Glavaris, Patricia Glavaris (collectively "Glavaris") and Benny Tolley ("Tolley") are the purported class representatives. Glavaris purchased stock on various dates between August 18, 1986 and September 30, 1987, and purchased debentures on August 1, 1986, February 20, 1987, November 4, 1987 and June 30, 1989. Tolley purchased debentures on January 2, 1987.

On August 30, 1991, Binder and Fidel made a motion to intervene in Glavaris on the ground that "the interests of the unnamed class members in the putative plaintiff class may

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[41] Rifkind.

[42] The Glavaris complaint does not differentiate between purchasers of common stock ("stock") and GFC convertible subordinated debentures ("debentures"). Rather, the complaint refers generically to purchasers of "securities... While the Court did not focus on this point in the MOD, recent arguments made to the Court by the Glavaris plaintiffs necessitates a careful analysis of the differences between purchasers of stock and debentures.

no longer be adequately protected by the named class representatives.[43] The Court denied that motion.

As stated, on September 10, 1992, the Court issued the MOD on the motions to dismiss filed by the Glavaris Moving Defendants. After parsing plaintiffs' disorganized and somewhat obscure 154 page complaint, the Court reached numerous factual and legal conclusions. Without reciting the rationale behind each of the Court's conclusions, the Court now summarizes the pertinent points of the MOD.

First, the Court determined that, given the facts and circumstances of this case,the three-and-a-half year class period based on fraud on the market did not accurately reflect the significantly different markets in which GFC stock and debentures were purchased. Based on the dramatic disclosure of the catastrophic losses on October 30-November 3, 1987, and the public announcement of the takeover of Gibraltar Savings by the FSLIC on April 4, 1989, the Court determined that the three relevant time periods for the alleged class members in this case are: Period I-- January 1, 1986 (when the class begins) through November 3, 1987 (when the catastrophic losses had been fully publicized); Period 2-- November 4, 1987 through April 3, 1989 (when the takeover of Gibraltar Savings by the FSLIC had been fully publicized); and Period 3-- April 4, 1989 through November 16, 1990 (the filing of Glavaris).[44]

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[43] Binder and Fidel motion to intervene at 2 (filed August 30, 1991).

[44] The Glavaris action only extends its class period to April 1989. Glavaris purchased debentures on June 30, 1989. Therefore, for purposes of analysis, the Court extended the class closing date until November 16, 1990 to cover the

Applying the framework of these three periods to the claims under Section 10(b) and Rule 10b-5, the Court concluded that: (1) the statute of limitations barred claims for period one; (2) the representative plaintiffs had no standing to bring claims for period two;[45] and (3) there was no

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entire period in which plaintiffs allege transactions in GFC stock or debentures.

[45] Bretz argues that the November 4, 1987 purchase gives Glavaris standing to represent plaintiffs in period 2. This argument not only ignores the realities of the market, but also the requirement that a purchaser rely upon some material misrepresentation in order to make a claim for a violation of Section 10(b). Any purchaser who bought stock immediately after GFC publicly announced catastrophic losses could not have bought stock based on the allegedly fraudulent misrepresentations made during the "unsafe and unsound" period that were ultimately disclosed in April of 1989.

Moreover, Glavaris appears to have been simply taking advantage of the downturn in GFC stock when he made the purchase of 5000 shares of GFC stock on November 4, 1987 for $24, 865.63. Glavaris had previously purchased 5000 shares of GFC stock on August 1, 1986 for $63, 169.86 and on February 20, 1987 for $61,452.07. In other words, Glavaris purchased 5000 shares on November 4, 1987 at about one-third the price of identical purchases made within the last year. The federal securities laws are intended to protect investors from fraudulent misrepresentations, not from loss due to speculation. Therefore, Glavaris could not have satisfied the causation element required to state a claim under Section 10(b).

Finally, for the reasons stated, the Court finds disingenuous Glavaris' statement that he "does not believe he learned about such reported loss [on October 30-November

actionable fraud alleged in period three. The Court dismissed the Section 10(b) and Rule 10b-5 claims against all of the Glavaris Moving Defendants.

The Court next considered the claims for proxy fraud alleged under Section 14(a) of the Securities Exchange Act of 1934 ("Section 14(a)") and Securities Exchange Commission Rule 14a-9 ("Rule 14a-9"), based on misrepresentation in the 1987 and 1988 GFC Proxy Statements. The Court held that the statute of limitations was a bar to any claims in the 1987 proxy statement relating to GFC's financial condition, its real estate investments and the FHLBB's concerns about these matters. The claims for misrepresentations in the 1988 Proxy Statements lacked specificity and were dismissed with prejudice. The Court determined that plaintiffs may proceed only against Glavaris Moving Defendants Harrison and Nussbaum on claims that: the 1987 Proxy Statement failed to disclose that the FHLBB was demanding that GFC maintain the minimum regulatory capital required for Gibraltar Savings and that Gibraltar Savings did not pay cash dividends to GFC in excess of 50% of Gibraltar Savings' annual income; and that the 1987 Proxy Statements failed to accurately report the total compensation of certain executives or the fact that certain executive received $12 million in bonuses. Harrison and Nussbaum were subsequently dismissed with prejudice as part of the Neubronner settlement.

3,1987] until sometime after he completed his purchase of Gibraltar stock on November 4, 1987." Plaintiffs' opposition to officer/directors' motion to dismiss at 9. In any event, Glavaris' individual knowledge is irrelevant to whether the market had received and reacted to the information about the GFC losses at the time he bought.

The Court also dismissed with prejudice plaintiffs' claims for violation of RICO on the grounds that: there was no "enterprise"; many claims failed to state an injury as a result of the alleged predicate acts; many claims lacked the necessary specificity required of fraud claims; some claims were based on securities violations which this Court has already found insufficient to state a claim; and other claims were based on acts which could not qualify as predicate acts of racketeering activity within the definition of RICO.

Plaintiffs also brought seven claims under state law that involve the Glavaris Moving Defendants. In ruling on these claims, the Court first dismissed the sixth claim for breach of fiduciary duty against defendants Nussbaum, Post, Boyle, Harrison and Glupker as time-barred, as well as for failure to state a claim. Because plaintiffs failed to allege a fiduciary relationship between themselves and Ernst or Peat, the Court dismissed the breach of fiduciary claim against those defendants as well. Moreover, the Court reiterated that it had already dismissed the breach of fiduciary duty claim against Gibson by order dated June 18, 1991 and entered July 15, 1991.[46]

Next, the court dismissed the eighth and ninth claims for actual and constructive fraud against Post, Boyle, Harrison, Glupker, Nussbaum, Rifkind, Ernst, Peat, and Gibson on the grounds that all of the specific allegations on which the claims were based fail to plead fraud with

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[46] A request for sanctions was made by Gibson. Although the Court noted that sanctions were appropriate based on plaintiffs, deliberate repleading of dismissed claims in violation of the Court's prior order, resolving all doubts in favor of plaintiffs, the Court declined to make such an award.

particularity; some of the claims were time-barred; and other claims failed to allege causation or injury.

Additionally, the Court dismissed the tenth and eleventh claims for negligence and negligent misrepresentation against the Glavaris Moving Defendants on the same grounds on which it dismissed the claims for actual and constructive fraud. The Court found that all of the claims for negligence and negligent misrepresentation were barred by the two year statute of limitations which governs negligent misrepresentation.

The Court then dismissed plaintiffs' twelfth claim for false and misleading advertising against Post, Boyle, Harrison, Glupker and Nussbaum for failure to state a claim.

Finally, the Court dismissed plaintiffs thirteenth claim for state securities law violations against Post, Boyle, Harrison, Glupker and Nussbaum on the ground that it failed to state a claim. The Court added that, even if plaintiffs were attempting to state a claim under Cal. Corp. Code § 25401 plaintiffs were barred for the same reasons that they were barred on their federal securities laws claims.

C. Filings, motions and settlements since the MOD

On September 22, 1992, twelve days after the Court issued the MOD, Bretz filed the Binder action on behalf of Binder, Fidel, and all persons similarly situated. The Binder Complaint defines the class as purchasers of "securities" between October 20, 1987 and January 25,

1989.[47] It alleges violations of section 10(b) and Rule 10b-5 against virtually the same defendants named in Glavaris,[48] based on essentially the same factual allegations. In Bretz' words, "Glavaris and Binder are almost mirror images of each other. There are no different claims. There are one or two additional factual allegations that are consistent with a claim in Glavaris.[49] Fidel traded heavily in GFC stock between January 22, 1986 and May 9, 1988, and bought debentures on various dates between July 6, 1987 and February 5, 1988. Joel Binder purchased debentures on November 9 and December 28, 1987, and on November 29 and December 7, 1988. Obviously, Bretz filed a class action complaint

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[47] As indicated earlier, the "Binder Complaint" refers to plaintiffs, First Amended Complaint filed on November 19, 1993.

[48] The Binder First Amended Complaint names defendants Young, James N. Thayer, the Estate of James N. Thayer and Eunice Thayer, as trustee of the Thayer Family Trusts (collectively "Thayer"), Jay Janis, the Estate of Jay Janis (collectively "Janis"), John R. Williamson ("Williamson"), Nussbaum, Michael Mooney ("Mooney"), Lynne Crawford (Crawford), Linda x.s. Blount ("Blount"), Robert Sprague ("Sprague"), Houston I. Flourney ("Flourney"), Bernice Hutter ("Hutter"), Melvin Spitz ("Spitz"), Rafael Vega ("Vega") (collectively the "Binder officers and Directors"), Gibraltar Savings, Gibraltar Savings, F.A. (collectively "Gibraltar Savings"), Rifkind, Ernst, Peat, and Gibson.

[49] Hearing on February 18, 1994 at 33-34.

designed to fit within the period two time frame as to which the Court had found there was no Glavaris class representative who could maintain these claims.

On November 1, 1993, the Court approved the settlement of the Neubronner action. Under the terms of the settlement, Lexington agreed to pay $5.1 million to Neubronner in exchange for a mutual release of all claims asserted by him against the named officers and directors of Gibraltar Savings and GFC.[50] Neubronner also agreed to instruct counsel for the officer/director defendants to remit $900,000 out of the $5.1 million to the RTC in partial consideration for the release of all claims in a related action, Resolution Trust Corporation v. Young, et al., CV 92-5916 MRP ("RTC v. Young"). As a result, Neubronner received $4.2 million in settlement of his claims, and the RTC received $900,000 in settlement of RTC v. Young (the "Neubronner Settlement"). In addition, plaintiffs in Glavaris and Binder agreed to dismiss defendants Nussbaum and Harrison[51] with prejudice from the Glavaris and Binder actions, even though the Glavaris and Binder plaintiffs were paid nothing as a result of the Neubronner Settlement. Finally, Lexington agreed that it would tender its full policy proceeds remaining after the settlement of Neubronner for the defense and/or settlement of the Glavaris and Binder actions. According to Bretz, papers in support of the Neubronner

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[50] Young, Thayer, Janis, Williamson Nussbaum, Mooney,
Crawford,Charles McCain, Barger, Blount, Sprague, Fluornoy, Hutter, Spitz and Vega.

[51] Harrison was not named as a defendant in Binder.

Settlement, $300,000-$400,000 then remained under the Lexington policy to be applied to the Glavaris and Binder actions.

Although superficially, the Glavaris and Binder plaintiffs joined in the Neubronner settlement, those plaintiffs did not in fact intend to settle anything. In a footnote in the "Joinder by Neubronnere Glavaris, Tolley and Binder to motions for court's determination of good faith settlement by Gibraltar officer/director defendants and RTC/receiver in Neubronner" ("Plaintiffs' Motion for Good Faith Settlement") filed on October 27, 1993, Bretz explained that Fidel had not objected to the dismissal of defendants Nussbaum and Harrison, but had not joined in the Plaintiffs' Motion for Good Faith Settlement. Fidel withheld his approval on the ground that he wanted to preserve his claim that he had been misled when he participated in the In re Gibraltar settlement. See Plaintiffs' Motion for Good Faith Settlement at fn. 6. In another footnote, Plaintiffs' Motion for Good Faith Settlement expanded the objection to all of the plaintiffs in Glavaris and Binder. Footnote 18 provides:

> Following Gibraltarts October 30, 1987 loss announcement, and the initiation of shareholder derivative and class action litigation against GFC and the Gibraltar officer/directors, National Union Fire Insurance Company and Lexington Insurance Company (which are understood to be subsidiaries of the same parent company) entered into an arrangement whereby coverage under the National Union policy was cancelled in favor of coverage under the Lexington policy. None of the Plaintiffs, or to the best of such Plaintiffs' knowledge no claimants under the policies, knew anything about the subject arrangement which effectively reduced the amount of coverage available to all claimants by one-half. Such

> arrangement has only recently come to the attention of the Plaintiffs and their counsel. As part of the within settlement, and as provided for in the Settlement Agreement, Plaintiff Nubronner is required to release Lexington and its insured from any and all further claims under the Lexington policy. However, the Glavaris and Binder Plaintiffs have not agreed to provide any such waiver. Accordingly, the subject settlement and the Court's good faith determination in respect thereof is intended and should be deemed for all purposes to be without prejudice to the Plaintiffs for claims, causes of action and recoveries against the full amount of insurance coverage as originally provided for in the National Union and Lexington insurance policies and, except as expressly provided for in the Settlement Agreement in Neubronner, the Plaintiffs expressly reserve all rights in respect thereof. (emphasis added).

As one might expect from the language of this footnote, Bretz intended to and did file another lawsuit on behalf of Fidel. on December 14, 1993, only six weeks after settling Neubronner, Bretz filed Bernard Fidel et al. v. National Union Insurance, CV No. 93-7522 NRP ("Fidel"). In Fidel, brought on the basis of diversity jurisdiction, Fidel alleges forty-seven claims[52] against the insurance companies,

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[52] These include claims for: attorney malpractice, "breach of fiduciary or other special duty", negligent misrepresentation, fraud and deceit, constructive fraud, "breach of contract or other professional engagement", intentional interference with contractual relationships, intentional interference with prospective economic advantage, intentional interference with contractual relationships, fraud, conspiracy and aiding and abetting, rescission, and declaratory relief.

attorneys, and various officers/directors involved in the settlement of the In re Gibraltar class action: National Union; Lexington; American International Group; Parker, Coulter, Daley & White; Clemens, Glassman & Clemens; Stull, Stull & Brody; Gibson; Young; Williamson; Spitz; Hutter; Vega; Fluornoy; and Sprague.

The Fidel defendants have now moved to dismiss that action. While those motions are not the subject of this memorandum, the Court notes at this point that it seriously questions the contention in footnote 18 that "[s]uch arrangement [made with the insurance companies in the settlement of In re Gibraltar, has only recently come to the attention of the Plaintiffs and their counsel." This "arrangement" was specifically addressed at the settlement hearing on September 11, 1989. Moreover, the Court received a letter from Fidel, dated June 12, 1990 that expressed in considerable detail his concerns regarding the In re Gibraltar settlement and the availability of additional insurance funds under the Lexington policy. In response to the Court's request for an explanation from Bretz as to the basis for the allegation that Fidel did not know of the additional insurance until late 1992, Fidel lodged a declaration with this Court. In that declaration, Fidel stated that in his letter of June 12, 1990 he had lied to the Court in order to persuade the Court to take remedial action on his behalf. In the declaration explaining the 1990 letter, Fidel stated:

> I must use this occasion to apologize to the Court for some of the statements contained in the Letter which were not entirely accurate. . . . I thought that if I wrote to the Court setting forth a possible scenario that the Court would undertake an investigation . . . [53]

Fidel also stated:

> The reason that I did not previously provide my attorney, Mr. Bretz, with a copy of the Letter was because I was somewhat embarrassed at having written to the Court including statements that I really did not know were true at the time that I wrote them.[54]

The significance of the letter of June 12, 1990 will be considered in connection with the Fidel action and the motions to dismiss filed therein. Here, the Court references the letter, juxtaposed with the declaration, only to point out the futility of trying to rely on the accuracy of factual statements and allegations made by Bretz and his clients. No matter how much public information has been available, and how many public hearings have been held since 1987, plaintiffs, in all these cases, will continue to argue that nothing was known to them at anytime which would bar their continuing to file lawsuits based on the same events. And the filing is obviously not over, because, as Bretz informed the Court at the hearing on February 18, 1994 he intends to file a "declaratory relief action that will dovetail into the

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[53] Fidel declaration at 2 (lodged July 11, 1984).

[54] Id. at 3.

Fidel action to try and get this court to put that policy back on the table."[55]

D. Summary of Filings related to GFC and Gibraltar Savings

There have been at least fifteen lawsuits filed relating to alleged acts of mismanagement of or misrepresentations made by GFC, Gibraltar Savings, their officers/directors, attorneys and accountants over a period of almost ten years. Bretz has represented parties or been involved in at least seven of these fifteen lawsuits. In these seven lawsuits, Bretz takes wholly inconsistent positions without regard to whether his clients are helped or hurt by the inconsistencies. This designedly haphazard litigation not only forces the Court to engage in "discovery" with respect to its own as well as other court's cases, but also requires it to analyze the tortured legal arguments created by these inconsistencies.

In simple terms, this is what plaintiff's counsel Bretz has done: first, he filed Neubronner, a lawsuit on behalf of an individual, to recover virtually the whole of the remaining Lexington policy for the Mercatura Trust; second, he filed the Glavaris class action which contained some similar and some different claims from those in the In re Gibraltar class action; next, realizing that the representative plaintiffs in Glavaris had no standing to assert various claims in that action, he filed the Binder class action to try to "save" any claims that had been dismissed by the MOD issued in Glavaris; then, he settled the Neubronner action, in which his individual client received all but $300,000-$400,000 of the remaining Lexington insurance proceeds, thereby depriving the Glavaris and Binder plaintiffs of almost any recovery against the officer and directors' insurance; one month after settling

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[55] Hearing on February 18, 1994 at 56.

Neubronner, and virtually exhausting the Lexington policy, he filed Fidel in which plaintiffs charge that the insurance companies and attorneys covered up additional insurance funds that would have been available to settle the In re Gibraltar, action; finally, he informed the Court that he plans to file an additional action that "dovetails" into the Fidel action.

With this background, the Court now addresses the motions to dismiss the claims in Glavaris filed by the RTC/Gibraltar Savings and the Gibraltar officer/director defendants, the Binder plaintiffs, motion to intervene in Glavaris and the motions to dismiss by all of the defendants in Binder.

II. MOTIONS TO DISMISS IN GLAVARIS

The Court now considers the motions to dismiss filed by the Resolution Trust Corporation, as receiver for Gibraltar Savings and Gibraltar Savings, F.A. ("RTC/Gibraltar Savings"), and the remaining Gibraltar officer/directors ("Officer/Director Defendants").[56] The Court also addresses

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[56] Young, Thayer, Janis, Williamson, Mooney, Blount, Crawford, Sprague, Fluornoy, Mutter, Spitz and Vega. Defendants Nussbaum and Harrisson were dismissed with prejudice as part of the Neubronner settlement. At the time the prior Glavaris motions to dismiss were filed and the MOD was issued, a stay was in effect as to the Gibraltar officer/director defendants because their counsel, Gibson, had been sued in the same action. By the issuance of the MOD, Gibson was dismissed. The Court recently lifted the stay as to all remaining parties in Glavaris. Therefore, the officer/director defendants now move to dismiss.

plaintiffs' request to reconsider whether the statute of limitations bars all of plaintiffs' claims for violation of § 10(b) and Rule 10b-5 during period 1. Additionally, the Court reconsiders plaintiffs' argument that Binder and Fidel should have been permitted to intervene in Glavaris to "save" the various claims which were dismissed in the MOD and concludes that Binder and Fidel should not have been permitted to intervene in Glavaris. The Court having reached that conclusion, then considers the motions to dismiss in Glavaris based only on the merits of the Glavaris complaint.

A. Federal Claims

1. Section 10(b) and Rule 10b-5

Plaintiffs' first claim alleges violations of Section 10(b) and Rule 10b-5 by all named defendants[57]. Plaintiffs'

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[57] Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C., § 78j(b) provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe.

Rule 10b-5 of the Securities Exchange Commission, 17 C.F.R. § 240.10b-5, provides:

second claim, against all defendants, attempts to state a claim for aiding and abetting violations of Section 10(b) and Rule lOb-5. The second claim for aiding and abetting a violation of Section 10(b) and Rule l0b-5 is dismissed. Under the Supreme Court's recent decision, Central Bank v. First Interstate Bank, 114 S. Ct. 1439 (1994), a private plaintiff may not maintain an aiding and abetting suit under Section 10(b).

To state a claim under § 10(b), a plaintiff must allege that in connection with the purchase or sale of a security, the defendant, acting with scienter, made a false material representation or omitted to disclose material information that defendant owed a duty to plaintiff to disclose, upon which plaintiff relied and which caused plaintiff injury. Cox v. Eichler, 765 P. Supp. 601, 697 (N.D. Cal. 1990).

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

In the MOD, the Court addressed each of the elements of a claim under S 10(b). Most significantly, in analyzing the "fraud on the market" theory of reliance, the Court determined that the three-and-a-half year class period did not take into account the very different markets in which individuals purchased GFC stock and debentures. Accordingly, the Court divided the entire class into three subclasses: Period 1-- January 1, 1986 (when the class begins) through November 3, 1987 (when the catastrophic losses had been fully publicized); Period 2-- November 4, 1987 through April 3, 1989 (when the takeover of Gibraltar Savings by the FSLIC had been fully publicized); and Period 3-- April 4, 1989 through November 16, 1990 (the filing of Glavaris).[58]

Next, the Court analyzed whether plaintiffs stated a claim against the Glavaris Moving Defendants during each of the three time periods. The Officer/Director Defendants and the RTC/Gibraltar Savings now argue that the Court should apply the identical analysis to the claims against them.

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[58] Plaintiffs have not yet moved for class certification. The Court divided the class into three subclasses sua sponte based on the legal theory presented in the Second Amended Complaint, and on the additional papers considered by the court. See Geraghty v. United states Parole Commission, 579 F.2d 238, 253 (3d Cir. 1978), vacated on other grounds, 445 U.S. 388 (1980) (the need for subclasses is a decision for the district judge to make and the decision may be sua sponte); 7B Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1790 (1986). While the Court doubts that it could ever certify any of the three subclasses, it certainly could never consider the entire three-and-a-half year period of purchasers of GFC stock and debentures as a single class.

a. Period I

In the MOD the Court dismissed the claims against the Glavaris Moving Defendants under § 10(b) on the ground that the statute of limitations had run as to those claims.

In Lampf Pleva Linkind, Prupis & Peticrow v. Gilbertson, 111 S. Ct. 2773 2782 (1991), the Supreme Court determined that the statute of limitations for actions under § 10(b) and Rule l0b-5 runs after one year from the discovery of the facts constituting the violation and after three years from such violations[59]. Initially, the statute of limitations applied retroactively. James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439 (1991). However, Congress amended the Securities Exchange Act of 1934 (the 111934 Act") to provide that the Lampf statute of limitations applies only to actions commenced after June 19, 1991[60] since this

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[59] The Court specifically adopted the language of Section 9(e) of the 1934 Act, 15 U.S.C. § 78i(e), which provides:

> No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation.

Lampf, 111 S.Ct. 2773, 2782 (1991).

[60] Section 27A of the 1934 Act, 15 U.S.C. § 78aa, provides:

> The limitations period for any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991, shall be the

action was filed in 1990, Lampf does not apply. Therefore, the limitations period defined by the Ninth Circuit as applicable to § 10(b) claims prior to Lampf controls.

Prior to Lampf, the Ninth Circuit borrowed California's three-year statute of limitations for fraud, cal. Civ. Proc. Code § 338(d),[61] in actions based on § 10(b). Davis v. Birr, Wilson & Co., 839 F.2d 1369, 1369-70 (9th Cir. 1988). "Although state law governs the length of the limitations period, federal law controls the point at which the statute commences to run." Volk v. D.A. Davidson & Co., 816 F.2d 1406 1412 (9th Cir. 1987) (citing SEC v. Seaboard Corp., 677 F.2d 1301, 1309 (9th Cir. 1982)).. "The statute of limitations begins to run when the plaintiff has actual knowledge of the fraud or knowledge of facts sufficient to put a reasonable person on notice." Davis, 839 F.2d at 1370.

The time of accrual for the limitations period in this case is dependent upon when the truth regarding the particular fraudulent misrepresentation or omission was publicly disclosed such that a reasonable person would be on notice of the alleged fraud. In the Ninth Circuit, "when the plaintiff discovered or should have discovered the fraud with

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limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, an such laws existed on June 19, 1991.

[61] Cal. Code Civ. Proc. 338(d) states that "[a]n action for relief on the ground of fraud [must be brought within three years.] The cause of action in that case is not deemed to have accrued until discovery, by the aggrieved party, of the facts constituting fraud or mistake."

the exercise of reasonable diligence . . . is usually a question for the trier of fact. General Bedding Corp. v. Echevarria, 947 F.2d 1395, 1397 n.2 (9th Cir. 1991). Nevertheless, "[r]easonable diligence is tested by an objective standard, [citation omitted] and when uncontroverted evidence irrefutably demonstrates plaintiff discovered or should have discovered the fraudulent conduct, the issue may be decided on summary judgment." Davis, 839 F.2d at 1370 (quoting Kramas v. Security Gas & Oil, Inc., 672 F.2d 766, 770 (9th Cir.), cert. denied, 459 U.S. 1035 (1982); accord Mosesian v. Peat, Marwick, Mitchell & Co., 727 F.2d 873, 877 (9th Cir.), cert. denied, 469 U.S. 932 (1984).

Viewing the uncontroverted facts of the case against the plaintiffs theory of it, the Court concluded that there is "uncontroverted evidence [which] irrefutably demonstrates plaintiff discovered or should have discovered the fraudulent conduct" within clearly definable time frames. Using the three period time frame, the Court determined that the statute of limitations on the § 10(b) claim based on the fraud alleged in period one started to run no later than November 3, 1987, when Gibraltar's catastrophic losses were publicly announced. Glavaris was filed on November 16, 1990, more than three years later. Thus, the Court concluded that the § 10(b) claim arising from fraud alleged in period one was time-barred.

The RTC/Gibraltar Savings and the Officer/Director Defendants contend that the § 10(b) claims against them are also time-barred. Plaintiffs make two arguments in opposition. First, plaintiffs argue that the Court should not have concluded that the statute of limitations began to run on November 3, 1987 because the plaintiffs were not on inquiry notice of the fraudulent conduct by GFC management and professionals on October 30, 1987-November 3, 1987 when GFC announced its catastrophic losses. Second, plaintiffs contend that, even if the statute of limitations began to run on

November 3, 1987, the claims were tolled based on the filing of In re Gibraltar. Relying on the same theory urged on many occasions before, plaintiffs argue that defendants' fraud "pervaded and dominated the market for the value of Gibraltar's securities during the entire class period [ending April 3, 1989]," [62] and therefore no plaintiff could have been on notice of the claims now asserted. At the same time, the plaintiffs argue that in any event defendants were on notice of plaintiff's claims by the filing of In re Gibraltar in November of 1987 and thus cannot complain that the late filing of Glavaris presented them with new and unexpected liabilities. The Court now analyzes these very inconsistent statements.

i. When did the statute of limitations begin to run for period 1 claims?

Plaintiffs reject the Court's division of the class period into three subclasses based on the disclosures to the public on October 30, 1987 and April 30, 1989. Instead, plaintiffs argue a continuous "fraud on the market" theory. Plaintiffs contend that a class should be certified based on the entire three-and-a-half year period because defendants engaged in a "common course of conduct" for over nearly forty months, specifically, defendants engaged in a "pattern of false and

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[62] Glavaris Plaintiffs, Opposition to Gibraltar Officer/Director Defendants' Motion to Dismiss Second Amended Complaint at 16.

misleading statements and fraudulent concealment"[63] during this whole period. See Blackie v. Barrack, 524 P.2d 891, 901-905 (9th Cir. 1975) cert. denied, 429 U.S. 816 (1976) (holding that a class of purchasers over a twenty-seven month period could be certified where purchasers were allegedly defrauded over a period of time by similar misrepresentations). Plaintiffs argued, "this is a class made up of the people who bought and sold for three years or just bought for three years and no matter how often the representations changed this is still an omission case and it is based on the concept that these people lied to everybody all along."[64]

The Court rejected plaintiffs, argument in the MOD, and rejects it here as well.[65] In Blackie, the Court determined that "a series of financial reports uniformly misrepresent[ed] a particular item in the financial statement," and that plaintiffs were not apprised of the misrepresentations until an annual report was issued twenty-seven months after the initial misrepresentations began. Id. at 902-903. By contrast, this case involves a series of alleged misrepresentations and omissions concerning different facts, made by different people, over a forty month period during which two extraordinary disclosures occurred followed by two dramatic market corrections. Plaintiffs' counsel himself alleged in an earlier case that after October 30, 1987 the inside information was "out". Mercatura Trust v. Drexel Burnham Lambert Inc., No. CV 89-1461, Complaint at 7 ¶

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[63] Plaintiffs' opposition to officer/defendant's motion to dismiss at 15 fn. 14.

[64] Transcript of hearing on February 18, 1994 at 46.

[65] See MOD at 26.

24. Plaintiffs' characterization of the entire three-and-a-half year period as a perpetuation of a common course of conduct is an attempt to circumvent the Court's finding in the MOD, wholly disregarding the differing markets that existed during the three class periods.

Plaintiffs' argument also ignores this and other circuits, conclusion that a fraud on the market claim cannot stand where the market has received and reacted to the allegedly withheld or misrepresented information. See In re Apple Computer Securities Litigation, 886 F.2d 1109, 1115 (9th cir. 1989), cert denied, 110 S. Ct. 3229 (1990) ("In a fraud on the market case, the defendant's failure to disclose material information may be excused where that information has been made credibly available to the market by other sources."); In re Convergent Technologies Securities Litigation, 948 F.2d 507, 513 (9th Cir. 1991) (plaintiffs cannot maintain an action for "overstating the demand for [defendant's] AWS/IWS workstation" when the market was aware that AWS/IWS demand would not increase at the same rate it had in the past); Raab v. General Physics Corp., 4 F.3d 286, 289 (4th Cir. 1993) (the omission of "slow-down" in certain government contracts from corporation's annual report was not actionable under fraud-on-the-market theory because contemporaneous press release informed market of the slow-down); Cooke v. Manufactured Homes, Inc., 998 F.2d 1256, 1262 (4th Cir. 1993) (because the stock market was fully apprised of poor finances of corporation on date, no reasonable trier of fact could find that corporation committed fraud on the market after that date). Accordingly, the court affirms the position taken in the MOD that the plaintiffs' purchases must be separately analyzed based on the differing markets that existed after the disclosures on October 30 1987-November 3, 1987 and April 3, 1989.

Moreover, the Court confirms that the statute of limitations began to run for the claims made on misrepresentations during period one on November 3, 1987. As stated, the statute of limitations begins to run when the plaintiffs are on inquiry notice of the possibility of fraud. See Cooke v. Manufactured Homes, Inc., 998 F.2d 1256, 1263 (4th Cir. 1993) (in the context of securities fraud claims, inquiry notice is triggered by evidence of the possibility of fraud, not by complete exposure of the alleged scam). While plaintiffs argue that the October 30, 1987-November 3, 1987 press release and newspaper articles could not have put plaintiffs on notice of the underlying fraud because they did not actually know about it until many months later, the Court rejects this argument as not in conformity with existing law. See MOD at 28 ("there can be no doubt that these reports [between October 30, 1987 and November 3, 1987] placed any reasonable person on notice of potential fraud in the earlier statements made concerning its real estate investments and the general outlook for the company"). See also 17A J. Hicks Securities Law Series: Civil Liabilities, Enforcement and Litigation, § 6.10 (2][b][ii], at 6-304-9-306 and multiple authorities cited therein (Clark Boardman 1993) (Inquiry notice can come where the seller's optimistic projections, predictions, or expectations, even if made with a reasonable basis, are followed by a report or other communication that paints a dramatically different picture. . . . A significant decline in the market price of the securities within a relatively short period of time has been found to put purchasers on notice of a possible fraud.); Cooke v. Manufactured Homes, Inc., 998 F-2d 1256, 1263 (4th Cir. 1993) (holding that a gross decline in the value of the stock of the company, combined with the company's press release that revenues and earnings were down and newspaper articles attacking the health of the company put the market on inquiry notice of the possibility of fraud as a matter of law).

Although the reasons for counsel waiting so long are obscure, Glavaris was filed on November 16, 1990, more than three years after November 3, 1987. Therefore the statute of limitations had run as to the claims based on violations of § 10(b) and Rule 10b-5 during period one. Accordingly, the claims for violation of § 10(b) and Rule 10b-5 during period one are barred against the RTC/Gibraltar and the Officer/Director Defendants.

ii. Were plaintiffs' claims tolled by In re Gibraltar?

Plaintiffs' second position is that, even if the statute of limitations began to run on November 3, 1987, the statute was tolled during the pendency of In re Gibraltar under the doctrines enunciated in American Pipe and Construction Co. v. Utah, 414 U.S. 538 (1974) and Crown Cork & Seal Co. v. Parker, 462 U.S. 345 (1983).

In American Pipe, plaintiffs sought to intervene in a class action after the district court had denied class action status. The district court denied the motion to intervene on the ground that the statute of limitations had run as to the individual plaintiffs. The Supreme Court reversed. The Court determined that the principal purposes of class action procedure -- promotion of efficiency and economy of litigation -- would be frustrated if each class member was required to file a motion to intervene in order to ensure individual compliance with the statute of limitations. American Pipe, 414 U.S. at 551. Therefore, the Court announced that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." Id. at 554. In Crown, Cork, the Supreme Court extended the American Pipe rule to class members who file individual actions of

their own after class certification is denied. Crown, Cork, 462 U.S. at 349.

Because the tolling doctrine "is a generous one, inviting abuse," Crown, Cork 462 U.S. at 354 (Powell, J. concurring), Courts have imposed three limits in an attempt to minimize such abuse. [66]

First, the tolling doctrine "does not leave a plaintiff free to raise different or peripheral claims following denial of class status . . . Claims as to which the defendant was not fairly placed on notice by the class suit are not protected under American Pipe and are barred by the statute of limitations." Crown, Cork, 462 U.S. at 354 (Justice Powell, concurring, joined by Rehnquist, C.J.). See also American Pipe, 414 U.S. at 538 (citation omitted) ("The policies of ensuring essential fairness to defendants and of barring a plaintiff who 'has slept on his right' are satisfied when . . . a named plaintiff who is found to be representative of a class commences a suit and thereby notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment."); Korwek v. Hunt, 646 F. Supp. 953, 962 (S.D.N.Y. 1986) afffd, 827 F-2d

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[66] As Justice Blackraun noted,

> Our decision [American Pipe] . . . must not be regarded as encouragement to lawyers in a case of this kind-to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights.

American Pipe, 414 U.S. at 561.

874 (2d Cir. 1987) (tolling does not apply to claims that were not asserted in the prior class action).

Second, the statute of limitations is not tolled for a party who was not a member of the putative prior class. Applebaum v. State Farm Mutual Auto Insurance Co., 626 F. supp. 1299, 1304 (M.D. Pa. 1986) afff'd 806 F.2d 251 (3d cir. 1986) ("To rely upon a previously filed class action plaintiff must have been able to qualify as a member of the class in the previous action."); Shimazaki Communications, Inc. v. A.T. & T Co., 647 F. Supp. 10, 14-15 (S.D.N.Y. 1986) (plaintiff who was not a member of putative class action is not entitled to a toll based on that action).

Third, the policy considerations underlying the tolling doctrines in American Pipe and Crown, Cork do not apply to class members who attempt to file subsequent class actions. Robbin v. Fluor Corp., 835 F.2d 213, 214 (9th Cir. 1987). See also Korwek v. Hunt. 827 F.2d 8740 878 (2nd Cir. 1987) ("the tolling rule . . . was not intended to be applied to suspend the running of statutes of limitations for class action suits filed after a definitive determination of class certification"); Salazar Calderon v. Presidio Valley Farmers Ass'n, 765 F.2d 1334. 1351 cert. denied, 475 U.S. 1035 (1986) ("putative class members may [not] piggyback one class action onto another and thus toll the statute of limitations indefinitely").

In this case, plaintiffs argue that In re Gibraltar tolled the claims in Glavaris. This argument is remarkable in light of Bretz' statement that "it is my belief that none of the factual allegations upon which Plaintiffs' fraud claims are based were part of the pleadings referenced by the Court in

the MOD."[67] Since the "pleadings referenced by the Court in the MOD included In re Gibraltar, the Court will not speculate what plaintiffs, counsel means by the seemingly inconsistent statement, but instead will analyze the tolling doctrine as it applies to Glavaris without regard to counsels statement.

In re Gibraltar was a consolidated class action on behalf of holders of GFC common stock from January 23, 1986 through March 31, 1989 against GFC, Young and Nussbaum for violation of Section 10(b) and Rule 10b-5, fraud and deceit, and negligent misrepresentation. In re Gibraltar was filed on November 23, 1987[68] and was certified as a class for purposes of settlement on June 23, 1989. Glavaris opted out of the class on July 28, 1989 and filed suit on November 16, 1990.

Glavaris differs significantly from In re Gibraltar. Whereas In re Gibraltar applied only to GFC common stock holders from January 23, 1986 through March 31, 1989, Glavaris is brought on behalf of purchasers of GFC common stock, GFC debentures, and Gibraltar debentures from

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[67] Declaration of Robert Bretz in support of plaintiffs, opposition to defendant RTC/Gibraltar and the Gibraltar officer/director defendants, motion to dismiss plaintiffs, second amended complaint at 9 (filed December 10, 1993).

[68] In re Gibraltar is a consolidation of five class actions. The first of those actions, Model Associates Inc. v. Gibraltar Financial Corp., No. CV 87-7876, was filed on November 23, 1987.

January 1, 1986 through April 30, 1989.[69] While In re Gibraltar named only GFC, Young and Nussbaum as defendants, Glavaris names Gibraltar Savings instead of GFC,[70] Young, and Nussbaum, as well as Thayer, Janis, Williamson, Nooney, Crawford, Blount, Sprague, Fluornoy, Hutter, Spitz, Vega, Post, Boyle, Glupker, Harrison, Rifkind, Ernst, Peat, Sprayragen, and Gibson. Finally, In re Gibraltar asserted violations of S 10(b) and Rule l0b-5, fraud and deceit, and negligent misrepresentation, while Glavaris claims violations of § 10(b), fraud and deceit, and negligent misrepresentation, as well as violations of § 14(a) and Rule 14a-9, RICO, breach of fiduciary or professional duty, breach of statutory duty, constructive fraud and deceit, negligence,

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[69] Plaintiffs incorrectly argue that a claim on behalf of stockholders and bondholders is the same: In re Gibraltar specifically applied only to holders of GFC common stock; only GFC stockholders were notified of the action; and only GFC stockholders were given an opportunity to participate in the settlement. Moreover, bondholders and stockholders are not similarly situated. Whereas bondholders are creditors of GFC, stockholders are owners of the company. Because of the differing positions of these two investing groups, it would likely be impossible for the Court to certify a class made up of both bondholders and stockholders. See Pittleman v. Pearce, 8 Cal. Rptr. 2d 359p 364 (Cal. App. 1992) (discussing the fundamental conflict which exists between bondholders and stockholders).

[70] Although plaintiffs attempt to obscure this fact, GFC and Gibraltar savings are separate entities. GFC is in bankruptcy and could not be named in this suit.

false and misleading advertising, state securities law violations, and § 20(a) of the Securities Exchange Act, 15 U.S.C. § 78t(a). Additionally, Glavaris is a class action that follows a previous class action.

Therefore, the Glavaris complaint violates all of the limitations on the American Pipe a tolling doctrine: it adds defendants who were not parties to the prior class action; it adds claims that were not asserted in the prior class action; it adds plaintiffs who were not members of the prior class; and it purports to be a class action that follows a prior class action. Plaintiffs' blanket attempt to assert the tolling doctrine to all of the claims against all of the defendants in these circumstances clearly abuses the policy underlying the tolling rule.

Nevertheless, the Court finds that American Pipe tolling applies to the small category of individual claims brought by members of the In re Gibraltar class against defendants who were named in that, but only with respect to claims as to which the defendants were on notice. Because neither Patricia Glavaris nor Tolley owned any common stock, they were not members of the In re Gibraltar class and cannot benefit from the tolling doctrine.[71] John Glavaris purchased common stock during period one, and therefore was a member of the class identified in In re Gibraltar. However, Glavaris can only benefit from the tolling doctrine

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[71] Contrary to plaintiffs suggestion, GFC and Gibraltar bondholders were not and cannot now be considered members of the In re Gibraltar class: bondholders were not named in the complaint, the settlement, or the judgment; bondholders were not given notice of the In re Gibraltar settlement and the option to opt out; and bondholders never had an opportunity to collect from the class settlement.

to the extent he brought claims that were asserted in In re Gibraltar. Therefore, tolling only applies to Glavaris' claims against Young and Nussbaum for violations of § 10(b) and Rule l0b-5, fraud, and negligent misrepresentation. Because Nussbaum was dismissed with prejudice from Glavaris as part of the Neubronner settlement, the claims against him are dismissed.

In sum, because Glavaris' individual claim against Young for violation of § 10(b) and Rule l0b-5 was tolled from November 23, 1987 (the filing of Model) until July 28, 1989 (the date Glavaris opted out of In re Gibraltar), that claim is not barred by the statute of limitations. Additionally, the complaint alleges the elements of reliance and causation sufficiently to state a claim under § 10(b) and Rule 10(b). MOD at 21-43.

b. Period 2

As stated in the MOD at 21-43, no representative plaintiffs can state a claim for violation of § 10(b) or 10(b)-5 during period two against any of the defendants. As discussed in footnote 45, supra, Glavaris' purchase of common stock on November 4, 1987 does not give him standing to bring claims during period two. Therefore, the Court dismisses this claim against the RTC/Gibraltar and the Officer/Directors Defendants.

C. Period 3

As stated in the MOD at 32 and 42-43, any alleged misrepresentations made during this period are immaterial. Therefore plaintiffs cannot state a claim for violation of § 10(b) and Rule lOb-5 against the RTC/Gibraltar and the officer/Director Defendants during this period.

2. Proxy Fraud Claims

Plaintiffs' third and fourth claims allege violations of and aiding and abetting violations of § 14(a) and Rule 14a-9.[72]

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[72] Section 14(a) of the 1934 Act, 15 U.S.C. § 78n provides:

> It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 781 of this title.

Rule 14a-9, 17 C.P.R. § 240.14a-9 provides:

> (a) No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

Plaintiffs allege that material misrepresentations or omissions were made in connection with the GFC Proxy Statements issued on April 7, 1987 and April 8, 1988. Preliminarily it should be noted that only John Glavaris has standing to maintain any claim for proxy violation. Neither Patricia Glavaris nor Tolley were GFC stockholders, and therefore, were not solicited by the 1987 or 1988 Proxy Statements. See "Gibraltar Financial Corporation Notice of Annual Meeting of Stockholders May 22, 1987".

The purpose of § 14(a) is to prohibit management from deceptively securing stockholder approval for transactions requiring such approval. Gabrielsen v. BancTexas Group, Inc., 675 F. Supp. 367, 374 (N.D. Tex. 1987) (citing Mills v. Electric Autolite Company, 396 U.S. 375, 382 (1970)). Thus, the essential requirements of a § 14(a) claim are an underlying transaction for which management sought stockholders' approval or disapproval by the solicitation of proxies, and an injury caused by the approval or disapproval of the transaction. Id.; Herzog v. Russel, 483 F. Supp. 1346, 1353 & n.3. (E.D.N.Y. 1979).

As stated in the MOD at 47-49, most of the alleged misrepresentations and omissions in the 1987 and 1988 GFC Proxy Statements are either time-barred, immaterial, or too vague to be permitted to proceed. The Court's findings in the MOD apply equally to the claims against the RTC/Gibraltar and the Officer/Director Defendants based on the alleged misrepresentations in the 1987 and 1988 GFC Proxy Statements. At the time the remaining defendants filed their motions to dismiss, only the following two narrowly focused allegations remained in this case:

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1. The 1987 Proxy Statement failed to disclose that the FHLBB was demanding that GFC maintain the minimum regulatory capital required for Gibraltar Savings and that Gibraltar Savings not pay cash dividends to GFC in excess of 50% of Gibraltar Savings' annual income. Thus, it was not disclosed that GFC would have insufficient cash to consummate the acquisition of FSBF and that it would be forced to sell to Gibraltar Savings $35 million of the preferred stock of its Gibraltar Savings of Washington subsidiary in order to close the FSBF transaction.

2. The April 6, 1987 GFC Proxy Statement failed to accurately report the total compensation of certain executives or the fact that certain executives received $12 million in bonuses.

a. Claims against the RTC/Gibraltar Savings

The only persons subject to liability for violations are persons who solicit the proxy and persons who "permit the use of [their] names to solicit" the proxy. 15 U.S.C. § 78n(a). Moreover, "[i]n order to hold a person liable for proxy violations, one must show, at the very least, a substantial connection between the use of the person's name and the solicitation effort." Yamagato v. Omiya, 564 F.2d 1319, 1323 (9th Cir. 1977). The "substantial connection" requirement is satisfied against parties who did not actively solicit the proxy materials only when those parties permitted the use of their names and directly benefited by the shareholders' favorable vote. Mendell V. Greenberg, 612 F. Supp. 1543, 1552 (S.D.N.Y. 1985) aff'd in part, 927 F.2d 667 (2d Cir. 1990) corrected, 938 F.2d
1528 (2d Cir. 1991).

In this case, GFC, not Gibraltar Savings, was the issuer/solicitor of the 1987 Proxy Statement, and only GFC stockholders received the GFC proxy materials. In fact, Bretz filed an earlier action based on similar alleged misrepresentations in the 1987 GFC Proxy Statement, Stahl v. Gibraltar Financial Corporation, No. 87-03147 MRP ("Stahl"), in which the complaint acknowledged that GFC was the issuer. In Stahl, plaintiff sued only GFC (referred to in the Stahl complaint as "Gibraltar"), not Gibraltar Savings. The Stahl complaint provided:

> 3. Securities of Gibraltar are registered pursuant to Sections 12(b) of the Securities Exchange Act of 1934 and consequently Gibraltar is subject to the proxy solicitation requirements of Section 14 of such Act.
>
> . . .
>
> 29. The Proxy Statement was provided by the issuer, Gibraltar, and omitted information required to be furnished therein to Gibraltar shareholders as specified in Schedule 14A, promulgated pursuant to Section 14(a) of the Securities Exchange Act as more particularly described below.

Additionally, in dismissing the proxy claims against defendants Post, Boyle and Glupker, the Court previously noted that "they were employed by Gibraltar Savings not GFC. The Proxy statements were GFC materials." MOD at 50. Therefore, because the RTC/Gibraltar Savings was not the solicitor of the 1987 Proxy Statement, it cannot be held liable under § 14(a) or Rule 14a-9.

Further, that Gibraltar savings' name appeared in the Proxy Statement does not alter this conclusion. The Court does not find that there was a "substantial connection" between the use of Gibraltar Savings' name and the solicitation of the proxies. The primary transactions that the shareholders were called on to approve did not involve Gibraltar Savings: the shareholders were requested to approve indemnification for GFC's directors, not Gibraltar savings' directors; and the FSBF Acquisition Agreement was between GFC, FSBF, and Gibraltar Savings of Washington, F.A..

Finally, even if Gibraltar savings had allowed its name to be used to solicit the GFC proxy, Gibraltar Savings stood to lose, not gain, by making the alleged misrepresentations and omissions in the 1987 Proxy Statement. In plaintiffs, own words, the 1987 Proxy was materially deficient because it "[f]ailed to state or otherwise disclose that the purchase price proposed to be paid for the acquisition by GFC of First Savings Bank of Florida exceeded GFC's total cash and tangible net worth, and that payment by GFC in the approximate amount of $115 million cash to acquire First Savings Bank of Florida would require GFC to sell assets or borrow funds from Gibraltar Savings." Glavaris Complaint at ¶ 119(l)(iv). Therefore, assuming the validity of plaintiffs' contentions, Gibraltar Savings could not directly benefit from an affirmative vote on the acquisition of FSBF. Accordingly, all claims for violation of § 14(a) and Rule 14a-9 are dismissed against the RTC/Gibraltar Savings.

b. Claims against the Officers/Directors

Upon reconsideration of the proxy claims since the MOD, the Court dismisses all claims based on the second misrepresentation regarding failure to disclose executive compensation. In opposition to the Officer/Directors and RTC/Gibraltar's motions to dismiss plaintiffs failed to show

that the alleged misrepresentation or omission regarding the total compensation or bonuses of certain executives could be material or that such an omission caused plaintiffs damage. Additionally, the Glavaris Complaint fails to state any action or transaction that the shareholders were asked to approve that could have been affected by the alleged omission. See Gabrielsen v. BancTexas Group, Inc., 675 P. Supp. 3670 374 (N.D. Tex. 1987) (an essential requirement of a § 14(a) claim is an underlying transaction for which management sought stockholders' approval or disapproval by solicitation of proxies). Accordingly, all claims for a proxy violation based on this misrepresentation are dismissed with prejudice against all defendants in Glavaris.

Moreover, with regard to both of the misrepresentations, plaintiffs have failed to allege any connection between defendants Mooney Blount, and Crawford and any solicitation efforts. None of these three defendants were on the board of directors of GFC, and none were allegedly responsible for the preparation of, approval of, or issuance of GFC's 1987 Proxy Statement. Glavaris Second Amended Complaint ¶ 61 (12), (13), (14), (15), (16), (17), (20). Accordingly, all claims for proxy violations alleged against Mooney, Blount, and Crawford are dismissed with prejudice.

Therefore, plaintiffs may proceed on a claim for violation of § 14(a) only on plaintiffs first theory described above, and only against defendants, Young, Thayer, Janis, Williamson, Sprague, Flournoy, Hutter, Spitz and Vega.

C. Aiding and abetting proxy fraud

The court dismisses in its entirety plaintiffs' fourth claim for aiding and abetting proxy fraud. In Central Bank of Denver v. First Interstate Bank of Denver, 114 S. Ct. 1439

(1994) (1994), the Supreme Court hold that a private plaintiff may not maintain an aiding and abetting claim under § 10(b). The Court stated that "the text of the 1934 Act does not itself reach those who aid and abet a § 10(b) violation . . . [W]e think that conclusion resolves the case." Id. at 1448. While the Supreme Court did not address aiding and abetting liability under § 14(a), the rationale underlying the decision in Central Bank applies equally to liability under § 14(a). Accordingly, all claims for aiding and abetting proxy fraud are dismissed on the ground that a private plaintiff may not maintain an action for aiding and abetting proxy fraud.

3. RICO Claim

Plaintiffs' fifth claim for violation of RICO is dismissed in its entirety for failure to state a claim. MOD at 51-64.

4. Section 20 claims

Plaintiffs' fourteenth, fifteenth and sixteenth claims under § 20(a) of the 1934 Act, 15 U.S.C. § 78t(a)[73] name defendants Young, Williamson, Thayer, Janis, Flournoy and Spitz. Because the underlying claims under § 10(b) and §

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[73] Section 20(a) of the 1934 Act, 15 U.S.C. § 78t(a) provides:

Every person who, directly or indirectly, controls any person liable under any provision of this chapter or any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

14(a) against the RTC/Gibraltar savings have been dismissed, all claims for controlling person liability are also dismissed with prejudice. Wool v Tandem Computer, Inc., 818 F.2d 1433, 1440-41 n.8 (9th Cir. 1987) (in order to prevail on a Section 20(a) claim, plaintiff must prove that the controlled person violated a rule or regulation under the 1934 Act causing injury to plaintiff).

B. State law claims

1. Breach of Fiduciary Duty

Plaintiffs, sixth claim is for "breach of fiduciary or professional duty" against all defendants. Neither in the Glavaris Complaint nor in plaintiffs' opposition to defendants' motions to dismiss do plaintiffs cite any statutory or legal authority to state such a claim against all defendants. Instead, plaintiffs broadly allege:

> The defendants, and each of them . . . by virtue and as a result of the positions of trust and confidence they held with GFC and/or Gibraltar Savings, statutory, common law duties and/or responsibilities and/or the professional relationship that existed between such defendants and Gibraltar including its securities holders, were in a fiduciary or professional relationship with and owed fiduciary or professional duties of loyalty, care, candor, truthfulness and timely disclosure to GFC and Gibraltar Savings and its securities holders, including the Plaintiffs and each of them.[74]

This claim has numerous flaws. First, under California law, a bondholder is not owed any fiduciary duty

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[74] Glavaris Complaint ¶ 129.

by either the corporation or the corporation's directors. Pittelman v. Pearce, 8 Cal. Rptr. 2d 359i 363 (Cal. App. 1992). Thus, plaintiffs Patricia Glavaris and Tolley, who only held debentures, may not state a claim for breach of fiduciary duty against either the RTC/Gibraltar Savings or the officer/Director Defendants.

Second, the complaint does not state a claim for breach of fiduciary duty by the RTC/Gibraltar Savings. The complaint alleges that each of the defendants, including Gibraltar Savings, "owed fiduciary or professional duties . . . to GFC and Gibraltar savings and its securities holders" (emphasis added). In other words, the complaint alleges that the entity that was owed the fiduciary duty breached the duty to itself. Additionally, John Glavaris owned stock in GFC, not Gibraltar Savings. Therefore, even if a claim could be stated against GFC, it cannot be stated against Gibraltar Savings. Accordingly, this claim is dismissed against the RTC/Gibraltar for failure to state a claim.

Third, although a breach of fiduciary claim can exist against a corporations directors and officers, the claim in this case is fatally flawed. Generally speaking, a shareholder may assert two types of claims against a corporation's officers and directors: one is for mismanagement, in which case the shareholder asserts harm to the corporation; the other is for personal injury. In cases in which the gravamen of the complaint is mismanagement, a four year statute of limitations applies. Davis & Cox v. Summa Corp., 751 F.2d 15070 1520 (9th Cir. 1985). Here, the gravamen of the claim for breach of fiduciary duty is fraud, and not mismanagement. See Glavaris Complaint ¶¶ 128-133 (emphasizing failure to disclose information to plaintiffs); MOD at 67 fn. 69 ("the plaintiffs, claim is essentially that defendants breached their fiduciary duty by way of fraudulent misrepresentations and omissions"). Therefore, a three year

statute of limitations applies to this claim. Hatch v. Collins, 275 Cal. Rptr. 476, 479 (Cal. App. 1990) ("[T]he applicable statute of limitations is determined by the substance or gravamen of the action rather than the form of the pleading."); Cal. Code of Civ. P. § 338(d).

Looking at the gravamen of the claim, the Court must analyze the breach of fiduciary claim as a fraud claim.[75] See MOD at 65-67 (Court analyzes claims against Nussbaum, Post, Boyle, Harrison and Glupker as fraud claims). With respect to any fraudulent statements or omissions made by defendants during period one, the claims are time-barred for the reasons cited in the discussion of the § 10(b) and Rule 10b-5 claim.

However, the Court finds that because In re Gibraltar contained a claim for fraud and deceit, American Pipe dictates the tolling of the statute of limitations on Glavaris claim against defendant Young for breach of fiduciary duty on a fraud theory. To sustain a claim for fraud, Glavaris must show actual reliance and resulting damage. See Wilhelm v. Pray, Price, Williams & Russell, 231 Cal. Rptr. 355, 358 (Cal. App. 1986) ("Plaintiffs must show 'actual, reliance, ie. that the representation was an 'immediate cause' that altered their legal relations). Glavaris made three

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[75] Plaintiffs, ninth claim for constructive fraud and deceit is almost identical to plaintiffs, claim for breach of fiduciary duty. The claim for constructive fraud provides that "the defendants and each of them . . . were in a fiduciary relationship with GFC and/or Gibraltar Savings and Gibraltar's securities holders including the Plaintiffs and thereby owed a duty of loyalty, care, candor and truthfulness to the Plaintiffs, and each of them." Glavaris Complaint at 141-42.

purchases of GFC common stock: on August 10 1986, February 20, 1987 and November 4, 1987. The Glavaris Complaint alleges specific misrepresentations that defendant Young made that may have affected Glavaris, decision to purchase GFC stock, however, the complaint does not specifically match up Glavaris' purchases with reliance on specific misrepresentations. To prevail at trial, Glavaris will have to do so. At this stage, the Court will permit Glavaris to proceed on an individual basis against Young on this claim.

Any claim for fraud in period two is dismissed because no plaintiff has standing to bring a claim for period two.[76] Finally, because plaintiffs fail to allege any material misstatement for period three, the claim for fraud during period three is also dismissed.

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[76] Plaintiffs argue, without citing any authority, that a plaintiff need not purchase any stock to state a claim for breach of fiduciary duty during period two or three. This statement is correct in cases in which a plaintiff seeks to recover based on a theory of harm to the corporation, or based on a deprivation of a right as a shareholder, such as the right to inspect corporate records.

Here, however, the theory of recovery is fraud. If defendants made a misrepresentation or omission in their capacity as directors or officers after plaintiffs purchased stock, plaintiffs could not show causation or damages. Plaintiffs provide no authority for the proposition that a plaintiff may maintain an action for "breach of fiduciary duty" against a defendant who makes a misrepresentation or omission upon which no one relies.

2. Breach of Statutory Duty

Plaintiffs, seventh claim is against the GFC and Gibraltar Savings director defendants for breach of statutory duty under California Financial Code Section 6150, which states:

(b) Each director and officer of an association has a legal responsibility and fiduciary duty to administer the affairs of and provide sound management to the association.

This section appears to codify the requirement that officers and directors make decisions that are in the best interest of the corporation. Perhaps a shareholder could bring a derivative action on behalf of the corporation to recover damages for an officer or director's violation of this section. However, the Glavaris complaint is based on fraud, not on mismanagement. Moreover, plaintiffs do not provide, and this Court has not found, any authority that this section provides a private right of action for a shareholder of a corporation to recover damages. Accordingly, this claim is dismissed.

3. Fraud and Deceit

The elements of the eighth claim for actual fraud under Cal. Civ. Code § 1572 are "false representation as to a material fact, knowledge of its falsity, intent to defraud, justifiable reliance and resulting damage." Wilhelm v. Pray, Price, Williams & Russell, 231 Cal. Rptr. 355, 357 (Cal. App. 2 Dist. 1986) (emphasis in original).

As discussed in the breach of fiduciary section, the only viable claim for fraud is Glavaris' individual claim for fraud against defendant Young. The claims for fraud and

deceit against the other officers/directors and the RTC/Gibraltar Savings are dismissed with prejudice.

4. Constructive Fraud

Under Cal. Civ. Code Section 1573, the elements of the ninth claim for constructive fraud are a fiduciary relationship, nondisclosure, intent to deceive, reliance, and resulting injury (causation). Younan v. Equifax Inc., 169 Cal. Rptr. 478, 489 n.14 (Cal. App. 1980).[77]

As discussed in the breach of fiduciary duty section, under California law a bondholder is not owed any fiduciary duty by either the corporation or the corporation's directors. Pittelman v. Pearce, 8 Cal. Rptr. 2d 359, 363 (Cal. App. 1992). Therefore, Patricia Glavaris and Tolley may not maintain a claim for constructive fraud against either the RTC/Gibraltar Savings or the officer/director defendants. Additionally, the only viable claim for constructive fraud by a shareholder is John Glavaris individual claim for constructive fraud against defendant Young. The claims for fraud and deceit against the other officers/Directors and the RTC/Gibraltar[78] are dismissed with prejudice.

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[77] Cal. Civ. Code § 1573 states: "Constructive fraud consists of: 1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice or to the prejudice of any one claiming under him; or, 2. In any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud."

[78] The Glavaris Complaint does not state any fiduciary duty between Gibraltar Savings and the GFC shareholders. The complaint alleges that "the defendants and each of them .

5. Negligent Misrepresentation

The elements of the eleventh claim for negligent misrepresentation are similar enough to claims for actual and constructive fraud that the analysis above need not be repeated.[79] The primary difference between the statutory

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. . were in a fiduciary relationship with GFC and/or Gibraltar Savings and Gibraltar's securities holders." Glavaris Complaint ¶ 143. Paragraph 142A of the complaint goes on to identify the fiduciary and professional duties between the various defendants and plaintiffs, but does not include any reference to Gibraltar Savings. Moreover, John Glavaris owned stock in GFC, not Gibraltar Savings. Therefore, even if a claim could be stated against GFC, it cannot be stated against Gibraltar Savings.

[79] "The elements of a cause of action for negligent misrepresentation are:

1. The defendant must have made a representation as to a past or existing material fact;
2. The representation must have been untrue;
3. Regardless of his actual belief the defendant must have made the representation without any reasonable ground for believing it to be true;
4. The representation must have been made with the intent to induce plaintiff to rely upon it; 5. The plaintiff must have been unaware of the falsity of the representation; he must have acted in reliance upon the truth of the representation and he must have been justified in relying upon the representation.
6. And, finally, as a result of his reliance upon the truth of the representation, the plaintiff must have sustained damage."

fraud and common law negligent misrepresentation claims is that in order to state a negligent misrepresentation claim, the plaintiff need not allege that the defendant knew the falsity of the misrepresentation. It is enough that the defendant made it without reasonable belief. Christiansen v. Roddy, 231 Cal. Rptr. 72i 75 (Cal. App. 1986). This difference is not sufficient to cause the Court to reach a conclusion with respect to this claim that is any different than that reached with respect to the fraud claims.

More importantly, the outcome with respect to this claim is dictated by the application of the two year statute of limitations respecting negligent misrepresentation claims. See. e.g., Continental Motion Pictures v. Allstate Film Co., 590 F. Supp. 67, 72 (C.D. Cal. 1984); David K. Lindamutli Co. v. Shannon Fin. Corp., 660 F. Supp. 261t 264 (N.D. Cal. 1987). But see Donoghue v. Orange County, 848 F.2d 926, 930 (9th Cir. 1987)(one year statute of limitations applied to negligent misrepresentation action)[80]. Because all of the alleged

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Christiansen v. Roddy, 231 Cal. Rptr. 72,75 (Cal. App. 5 Dist. 1986) (Citations omitted).

[80] In opposition to defendants' motions to dismiss, plaintiffs attempt to argue that the statute of limitations for a negligent misrepresentation claim is three years. However, rather than provide any authority for such a proposition, the court received counsels bracketed note to himself to "cite from prior brief." Plaintiffs' opposition to defendants RTC/Gibraltar and the officer/director defendants' motion to dismiss at 27 n. 26 (February 7, 1994). This is only one example of Bretz' careless pleading style and willingness to craft an argument without attention to the relevant law. Even if plaintiff could cite a case supporting a three year statute of limitations, the Court's analysis would remain the same.

misrepresentations occurred more than two years before the action was filed, all claims for negligent misrepresentation are time-barred.

However, because the In re Gibraltar action contained a claim for negligent misrepresentation against defendant Young by stockholders, the American Pipe tolling doctrine applies to John Glavaris individual claim against Young. Glavaris was filed within the two year statute of limitations; therefore, this claim is timely. As with the claim for actual and constructive fraud, to prevail Glavaris will have to prove actual reliance on particular negligent misrepresentations made by Young in making any of his three purchases of GFC stock.

6. False and Misleading Advertising

As discussed in the MOD at 82-83, the twelfth claim is insufficient as a matter of law.

7. State Securities Law Violations

As stated in the MOD at 83-84, the thirteenth claim is incomprehensible. Because no defendant could ever prepare an adequate answer to this claim, it must be dismissed.

Additionally, looking at what the claim might be intended to charge, the claim must be dismissed. In the MOD, the Court analyzed this claim as one for violation of Cal. Corp. Code § 25401 which provides:

> It is unlawful for any person to offer or sell a security in this state or buy or offer to buy a security in this state by means of any written or oral communication

> which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." [81]

This section provides a statutory negligent misrepresentation claim for misrepresentations made in connection with the purchase or sale of a security in California, however, no proof of reliance is required, and the plaintiff need not plead the defendant's negligence. Bowden v. Robinson, 136 Cal. Rptr. 871, 878 (Cal. App. 1977).

For the same reasons that the Court dismissed the claims for violation of Section 10(b), the Court also dismisses the claims under this section. The statute of limitations under Cal. Corp. Code § 25401 provides that an action must be brought "before the expiration of four years after the act or transaction constituting the violation or the expiration of one year after the discovery by the plaintiff of the facts constituting the violation, whichever shall first expire." Cal. Corp. Code § 25506. Plaintiffs argue that this statute is not a "one year from when a person should have known" of the violation, but rather, "one year after the discovery" of the violation. Accepting for the moment plaintiffs' argument that the statute did not start running until plaintiffs had "actual knowledge" of the alleged violations, plaintiffs are still time-barred. At the very latest, plaintiffs must have known of the facts constituting the alleged violation by April 3, 1989

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[81] In their opposition to defendants, motions to dismiss, plaintiffs have not argued that the Court incorrectly interpreted the thirteenth claim as one brought under this section.

when the RTC took over Gibraltar Savings.[82] Glavaris was filed on November 16, 1990, more than one year later. Accordingly, any claims under this section are time-barred.

Even John Glavaris' individual claim for securities violations under this section is time-barred. John Glavaris opted out of In re Gibraltar on July 28, 1989. Assuming that the American Pipe doctrine tolled Glavaris' claim for alleged misrepresentations made in the sale of GFC common stock to him, any tolling stopped when he opted out of In re Gibraltar. Because Glavaris was filed more than one year after John Glavaris opted out of In re Gibraltar the claim for violation of the California securities laws is untimely.

Additionally, there is no evidence that any of the plaintiffs could satisfy the jurisdictional limits of Section 25401. Section 25401 only applies to offers or sales of a security "in this state." Under Cal. Corp. Code § 25008

> (a) An offer or sale of a security is made in this state when an offer to sell is made in this state, or an offer to buy is accepted in this state, or (if both the seller and the purchaser are domiciled in this state) the security is delivered to the purchaser in this state. . . .
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> (b) An offer to sell or buy is made in this state when the offer either originates from this state or is directed by the offeror to this state and received at the place to which it is directed.....

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[82] Plaintiffs will undoubtedly argue otherwise. Plaintiffs theorize that fraud continued into late 1989 and 1990. Nevertheless, the Court rejects the contention that plaintiffs were not actually aware of the facts underlying the alleged violations as of April 3, 1989.

Patricia Glavaris, John Glavaris, and Benny Tolley are residents of Virginia. GFC's common stock was traded on the New York Stock Exchange ("NYSE") and the Pacific Stock Exchange. GFC's 9-1/4% convertible subordinated debentures were traded on the NYSE. All purchases probably occurred on one of these exchanges, perhaps through brokers in Virginia. Therefore, it is unlikely that plaintiffs could satisfy § 25008. See McFarland v. Memorex Corp., 96 F.R.D. 357, 364 (N.D. Cal. 1982) ("Only purchasers who can show the requisite contacts with California can satisfy the jurisdictional limitations of Cal. Corp. Code Section 25008.11); In re Victor Technologies Securities Litigation, 102 F.R.D. 53t 60 (N.D. Cal. 1984), aff'd 792 F.2d 862 (9th Cir. 1986) (those,who purchased stock on the open market at some point after the initial public offering will not be part of the class entitled to proceed under sections 25500 and 25501); Weinberger v. Jackson, 102 F.R.D. 839, 847 (N.D. Cal. 1984) ("Aftermarket purchasers not purchasing in California are not part of the class as to the California Corporations claims."); Hudson V. Capital Management Intern. Inc., 565 F. Supp. 6150 631 (N.D. Cal. 1983) (named plaintiff could not represent a claim for violation of the California Corporations Code where there is no allegation that the plaintiff's investment had any nexus with California).

Accordingly, plaintiffs' claim for violation of the California securities laws is dismissed in its entirety against all defendants.

III. INTERVENTION

On August 30, 1991, Binder and Fidel made a motion to intervene in Glavaris under Federal Rules of Civil Procedure 23(d)(2), 24(a) and 24(b). The Court denied the motion to intervene orally at the October 7. 1991 hearing, and in a minute order issued the same day.[83] Neither the Glavaris nor the Binder plaintiffs made a formal motion for reconsideration of this issue. Nevertheless, in order to make the Court's position explicit, the Court now explains why the Binder plaintiffs could not and may not intervene in the Glavaris action.

A. Standing

Article III of the Constitution limits federal court jurisdiction to actual "cases or controversies." U.S. Const. art. III, § 2. cl.1. The case or controversy limitation of Article III requires that 'a party invoking federal court jurisdiction have standing -- that is, a personal stake in the outcome. Baker v. Carr, 369 U.S. 1861 204 (1962). To have standing, abstract injury is not enough: rather, a plaintiff must allege that he has sustained or is immediately in danger of sustaining some direct injury. O'Shea v. Littleton, 414 U.S. 488, 494 (1974). The injury must be both real and immediate, not conjectural or hypothetical. Id. This is the threshold question in every case. Warth v. Seldin. 422 U.S. 490, 498 (1975).

In a class action lawsuit, the threshold standing requirement is no different. The named plaintiffs must have

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[83] In various papers filed with the Court Bretz argued that the Court never actually ruled on the motion to intervene. That assertion is false. See Transcript of Hearing on October 7, 1991 at 3-5.

individual standing. "If none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class." O'Shea, 414 U.S. at 494; Bailey v. Patterson, 369 U.S. 311 32 (named plaintiffs cannot represent a class of whom they are not a part). Thus, the named plaintiff's standing to bring the claims asserted in the action must be addressed before considering whether the class and the representatives) satisfy the Rule 23 criteria. O'Shea, 414 U.S. at 494 n.3 ("There was no class determination in this case as the complaint was dismissed on grounds [lack of standing] which did not require that determination to be made."); see also 1 Newberg on Class Actions, § 2.09 (3d ad. 1992) (individual standing requirements must be analyzed separately and apart from Rule 23 class prerequisites).

Moreover, because individual standing constitutes a threshold inquiry, the proper procedure when the class plaintiff lacks individual standing is to dismiss the complaint, not to deny the class for inadequate representation. Dallas Gay Alliance v. Dallas County Hosp. Dist., 719 F. SUPP. 1380, 1391 (N.D. Tax. 1989) (court dismissed claims in a class action challenging policies of hospital's AIDS clinic in which named plaintiffs did not have standing); Foster v. Center Township of LaPorts County, 798 F.2d 237, 244 (7th Cir. 1986) (individual and class claims must be dismissed where named plaintiff never had standing to bring the action).

Additionally, in those situations in which a class is divided into subclasses, the litigation as to each subclass is treated as a separate law suit. The named plaintiffs must satisfy the threshold standing requirement for each subclass. Further, each subclass must independently satisfy Rule 23 class action criteria. Fed. R. Civ. P. 23(c)(4)(B) ("When appropriate a class may be divided into subclasses and each

subclass treated as a class, and the provisions of this rule shall be construed and applied accordingly."); Betts v. Reliable Collection Agency, Ltd., 659 F.2d 1000, 1005 (9th Cir. 1981) (a subclass must meet Rule 23 criteria independently of the class).

Finally, the "class action" complaint cannot be used to circumvent the standing requirement. A plaintiff without a claim cannot be allowed to bring suit by making a class action allegation. Mintz v. Mathers Fund, 463 F. 2d 495, 499 (7th Cir. 1972). "Similarly, a third party cannot intervene pursuant to Rule 24 of the Federal Rules of Civil Procedure in a class action to save a claim as to which the original plaintiff never had a claim for the intervenors cannot possibly have a claim or defense in common with a plaintiff who never had a claim." Turner v. First Wisconsin Mortgage Trust, 454 F. Supp. 899, 913 (E.D. Wisc. 1978). See also Lidie v. California, 478 F. 2d 552, 555 (9th Cir. 1973) ("where the original plaintiffs were never qualified to represent the class, a motion to intervene represents a back-door attempt to begin the action anew, and need not be granted").

Given the Glavaris named plaintiffs, lack of standing to pursue various claims, and the Glavaris Complaint's failure to state various claims, the Court now analyzes whether it was appropriate to deny intervention by Binder and Fidel.

1. Federal Claims

In this case, the Court determined that the three-and-a-half year class period does not accurately represent the wholly different markets in which individuals purchased GFC stock and debentures. Accordingly, the Court divided the entire class into three subclasses: Period 1-- January 1, 1986 (when the class begins) through November 3,

1987 (when the catastrophic losses had been fully publicized); Period 2-- November 4, 1987 through April 3. 1989 (when the takeover of Gibraltar savings by the FSLIC had been fully publicized); and Period 3-- April 4, 1989 through November 16, 1990 (the filing of Glavaris).

a. Section 10(b) Claims

As discussed in Part II(A)(1)(a), the only viable claim in Glavaris for violation of S 10(b) during period 1 is John Glavaris' individual claim against Young for misrepresentations made in connection with Glavaris, purchases of GFC common stock. Because only an individual claim could be stated for that period, Binder and Fidel should not have been allowed to intervene.

In Section II(A) of the MOD, the Court found that neither the Glavaris's nor Tolley can satisfy the causation element required to state a claim for violation of Section 10(b) during periods 2 or 3. Therefore, none of the named plaintiffs in Glavaris have standing to state a claim under Section 10(b) for purchases or sales of stock or debentures during that period. As stated in footnote 45, supra, John Glavaris' purchase of stock on November 4, 1987 does not give him standing to state a claim for misrepresentations made during period 2, otherwise known as the "unsafe and unsound" period. Further, while the Glavaris class representatives did sell GFC debentures during period 2, since the theory relied upon by plaintiffs is that the alleged misrepresentations and omissions by defendants had the effect of erroneously inflating the value of GFC securities, plaintiffs can claim no damages based on the sale of GFC stock and debentures during this or any other period.

Because the Glavaris named plaintiffs lack standing to assert claims for violation of Section 10(b) in periods 2 or 3,

it was appropriate for the Court to dismiss those claims. Moreover, the Binder plaintiffs had no right to intervene in the Glavaris class action to "save" those claims that Glavaris and Tolley have no standing to assert.

b. Proxy fraud claims.

As stated in Part II(A)(2), the only viable proxy claim in Glavaris alleges that the 1987 Proxy Statement failed to disclose that the FHLBB was demanding that GFC maintain the minimum regulatory capital required for Gibraltar Savings and that Gibraltar savings not pay cash dividends to GFC in excess of 50% of Gibraltar Savings' annual income. Plaintiff John Glavaris may proceed an this claim, individually, and potentially on behalf of other shareholders similarly situated.

In moving to intervene, Binder and Fidel only argued that the named plaintiffs in Glavaris did not adequately represent their interests because John and Patricia Glavaris and Benny Tolley did not purchase securities during period 2. The motion to intervene did not suggest that the named Glavaris plaintiffs could not adequately pursue the class claims for proxy violations. Therefore, it was within the Court's discretion under Federal Rule of Civil Procedure 24(b) to deny the motion to intervene by Binder and Fidel on the proxy claim.

c. RICO claim.

The Glavaris Complaint does not state a claim for violation of RICO. The complaint's failure to state a claim under RICO has nothing to do with the trading histories of the various purchasers of securities. Therefore, it was

appropriate for the Court to deny Binder and Fidel's motion to intervene in this claim.[84]

2. State law claims

As stated, Glavaris may proceed on an individual basis on claims for breach of fiduciary duty, fraud, constructive fraud and negligent misrepresentation against defendant Young. Because these are individual claims, Binder and Fidel could not intervene as to them.

As stated in the MOD at 64-84, and in the Second MOD in Part II(B), the Glavaris Complaint fails to state a claim for breach of statutory duty, negligence, false and misleading advertising and state securities law violations. Accordingly, Binder and Fidel could not intervene in those claims.

Moreover, it is highly unlikely that a class could ever be certified based on the state law claims in this case. individual questions of law and fact certainly overshadow any common questions in the state claims. Further, proof of individual reliance would be necessary to support claims for fraud and negligent misrepresentation. See Hudson v. Capital Management Intern., Inc. 565 F. Supp. 615, 630 (N.D. Cal. 1983) (denying class certification for classes based on claims for fraud, negligent misrepresentation and malpractice). Although the claim for state securities law violations would not require proof of individual reliance, plaintiffs would be unlikely to succeed in certifying a class of nationwide purchasers of GFC securities because of the jurisdictional

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[84] Additionally, Binder could never represent a claim for proxy violations since Binder was not a stockholder.

prerequisites to bringing such a claim. See McFarland v. Memorex Corp., 96 F.R.D. 357, 364 (N.D.Cal. 1982) (certifying only a class of purchasers who bought stock in California). Because of the improbability of ever certifying a class based on the state law claims, the Court properly denied Binder and Fidel's motion to intervene in those claims.

B. Additional Considerations under Federal Rule of Civil Procedure 23

The Glavaris plaintiffs have never moved for class certification. Although Glavaris is framed as a "class action," extensive analysis of the notions to dismiss in the MOD and in this Second MOD indicates that the only potential class claim is one for proxy fraud based on one allegation against a limited number of defendants. In moving to intervene, Binder and Fidel attempted to "save" various claims that the Glavaris plaintiffs had no standing to bring. As stated in Section III(A), that motion was appropriately denied.

Moreover, even if Binder and Fidel had been allowed to intervene, that any class could have ever been certified under the requirements of Federal Rule of Civil Procedure 23 ("Rule 3") is highly unlikely.[85]

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[85] Federal Rule of Civil Procedure 23(a) provides: Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interest of the class.

1. Numerosity, commonality and typicality

The Glavaris class spanned three-and-a-half years and included both bondholders and stockholders. To accommodate the differences between the differing market conditions and different types of investors, the Court would have to create subclasses between purchasers during periods 1, 2 and 3, and between bondholders and stockholders[86] in each of those periods. Further, the stockholders would have to be divided into classes of stockholders who did not opt out of In re Gibraltar and those who did. Those who did not opt out of In re Gibraltar could not proceed on claims against Nussbaum and Young. Those who did opt out, like John Glavaris, would be entitled to proceed on claims against all defendants, so long as those claims were timely. However, because only 108 people opted out of In re Gibraltar, this subclass, divided between the different purchasing periods, would not be so numerous as to warrant class action status. Moreover, because more than nine subclasses would be required to even begin to adequately represent the interests of the different parties, the Court doubts that use of the class action device would promote judicial economy and efficiency.

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[86] As stated in footnote 71, supra, stockholders and bondholder have different investment positions. Although plaintiffs attempt to lump them together as "securities" holders, this strategy ignores the often conflicting positions of these investors, the different materials upon which the groups may have relied, and the different damages the groups may have sustained.

2. Adequacy of representation

Rule 23(a)(4) provides that a class action may be maintained only if "the representative parties will fairly and adequately protect the interests of the class." Thus, it is required that (1) the representative must not have interests antagonistic to or conflicting with the interests of the unnamed members of the class; and that (2) the representative must appear able to prosecute the action vigorously through qualified counsel. Lerwill v. Inflight Motion Pictures Inc., 582 F.2d 507, 512 (9th Cir. 1978).

a. Conflicts among class members

On the first issue, the Court doubts that Fidel and Binder, the proposed intervenors, could adequately amend the problems related to representation of the Glavaris class. As indicated in the motion to intervene, John and Patricia Glavaris and Benny Tolley cannot adequately represent the interests of stock and bondholders who purchased based on misrepresentations during period two because neither the Glavaris' nor Tolley purchased any securities based on those representations.

Fidel, on the other hand, purchased GFC common stock and GFC debentures during period two. However, Fidel did not opt out of In re Gibraltar, but instead received approximately $250,000 in the In re Gibraltar settlement. Therefore, Fidel could never represent a class of GFC common stockholders who opted out of In re Gibraltar on any claims that were already prosecuted in In re Gibraltar because Fidel has fully released the claims made against the defendants named in that case. Further, Fidel invested more than six million dollars in GFC, made numerous daily trades,

and apparently profited from various investments in GFC.[87] Fidel's extensive investment in GFC suggests a further ground for questioning Fidel's adequacy as a representative in a "fraud on the market" case. Binder, on the other hand, invested no money in GFC stock, but did invest in GFC debentures during period 2. Accordingly, Binder could not represent the purchasers of common stock.

Therefore, even if the Court were able to mitigate the conflicts among potential class members through the creation of numerous subclasses, it is doubtful that the intervention of Fidel and Binder would supply adequate representation for all of the purported class interests.

b. Adequacy of class counsel

The second issue in determining a plaintiff's ability to represent a class-- the adequacy of class counsel-- is of greater significance than the first. In fact, one commentator stated that "the single most important factor considered by the courts in determining the quality of the representatives ability and willingness to advocate the cause of the class has been the caliber of the plaintiffs attorney."[88] The proposed intervenors face an imposing obstacle on this point.

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[87] Plaintiffs Binder and Fidel"s "Statement of plaintiffs' purchases of sales of Gibraltar Securities" filed on February 9, 1994 fails to include any information regarding Fidel's sales of GFC stock or bonds.

[88] Symposium on Class Actions, The Class Representative: The Problem of the Absent Plaintiffs, 68 NW. U. L. Rev. 1133, 1136 (1974).

On June 2, 1989, Bretz filed Neubronner, an individual action on behalf of the largest single shareholder of GFC against GFC, Gibraltar Savings, and their officers, directors, and accountants. In re Gibraltar settled in September of 1989. As part of the settlement, Lexington agreed that it would cover any claims in Neubronner against the GFC and Gibraltar Savings' officers and directors. After settling In re Gibraltar, the officers and directors insurance policy contained 7-8 million dollars. Therefore, a finite amount remained to cover all of the additional claims against the officers and directors.

Nevertheless, in late 1990, Bretz filed Glavaris on behalf of John Glavaris, a stockholder who opted out of In re Gibraltar, and on behalf of a putative class made up of buyers of GFC securities. As sole counsel in the Neubronner and Glavaris actions, Bretz had a duty to seek the maximum recovery on Nubronner's individual claims, and at the same time to vigorously prosecute the claims in the Glavaris action. This presented a clear conflict in that recovery against the GFC officers and directors in Neubronner would necessarily reduce the amount left for the Glavaris plaintiffs on both individual and class claims. See Jackshaw v. Cleveland Press Pub. Co., 102 F.R.D. 183, 192 (N.D. Ohio 1984) (class counsel found inadequate where counsel was already representing other plaintiffs against the same defendants for recovery of defendants' finite assets); Sullivan v. Chase Inv. Services, Inc., 79 F.R.D. 246, 258 (N.D. Cal. 1978) (to proceed as class counsel, attorney ordered to withdraw from representation in a parallel securities fraud case against the same defendants; insurance fund of defendants would be insufficient to satisfy potential liability in both cases).

Then, in August of 1991, Bretz filed Binder and Fidel's motion to intervene in Glavaris. To allow such an intervention would have exacerbated the conflict that already

existed between Bretz's representation of both Neubronner and the Glavaris plaintiffs. The Glavaris plaintiffs purport to state claims for losses incurred during period 1. As intervenors, Binder and Fidel would have presented claims for losses during period 2. Obviously, any recovery for claims for losses during period 2 would reduce the already limited funds available for the Glavaris individuals and purported class members. At a minimum, Bretz would have been pursuing claims on behalf of a number of individuals -- Neubronner, John and Patricia Glavaris, Benny Tolley, Binder and Fidel -- with very different purchasing histories, all seeking to recover from the same insurance proceeds. Given the already significant conflict existing between the Neubronner and Glavaris plaintiffs, the Court could not exacerbate the problem by granting the motion to intervene by Binder and Fidel.

An it turned out, Bretz' conflict actually produced just the kind of result originally envisioned by the Court. On November 11 1993, the Neubronner case was settled. Neubronner received approximately $5.1 million, out of which $900,000 went to the RTC to settle RTC v. Young. As part of the Neubronner settlement, defendants Nussbaum and Harris were dismissed with prejudice from Glavaris, without any financial recovery to the Glavaris plaintiffs. Bretz asserted that after settlement of Neubronner, the officers and directors, insurance policy contains $300,000-400,000.[89] Counsel for the officer/Director Defendants stated

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[89] Joinder by D. Nubronner, John Glavaris, Benny Tolley and J. Binder to Motion for Court's determination of good faith settlement by Gibraltar officer/director defendants and RTC/Receiver in Neubronner including dismissal of defendants Nussbaum and Harrison in Glavaris and Binder cases and by RTC/Receiver in Neubronner at 10 (filed Oct. 27, 1993).

that the Neubronner settlement exhausted the limits of the Lexington policy.[90] Clearly, the settlement of Neubronner by Bretz significantly reduced the amount of the officers and director's policy then available to cover any viable claims asserted by Bretz in the Glavaris action. The addition of claims asserted by Bretz on behalf of Binder and Fidel also potentially reduced the funds available to the Glavaris plaintiffs and further entangled Bretz in the already serious conflict of interest between his duty to class members and his duty to individual clients.

IV. MOTIONS TO DISMISS IN BINDER

On September 22, 1992, Binder and Fidel filed Binder v. Young, et al. Plaintiffs filed a First Amended Complaint on November 18, 1993 (the "Binder Complaint"). The Binder Complaint, which mirrors Glavaris, asserts two claims for violations of Section 10(b) and Rule 10b-5, and one claim for aiding and abetting violations of Section 10(b) and Rule 10b-5. The Binder Complaint alleges that the GFC officers and directors,[91] Gibraltar Savings, Rifkind, Peat[92] and

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[90] Washton declaration at 20, filed as Exhibit A to the Notice of Motion and Motion for Order Requesting dismissal of defendants Nussbaum and Harrison and determining good faith of settlements (filed October 12, 1993).

[91] The Complaint names defendants Young, Thayer, Janis, Williamson, Nussbaum, Mooney, Crawford, Blount, Sprague, Flournoy, Mutter, Spitz, and Vega. Defendant Nussbaum was dismissed as part of the settlement in Neubronner.

Gibson (collectively the "Binder Defendants") made misrepresentations and omissions from October 20, 1987 through January 25, 1989 (the "Binder Class Period") which affected plaintiffs' purchases of "securities" during that period. As in the Glavaris Complaint, the Binder Complaint does not distinguish between purchasers of stock and debentures.

The Binder Defendants now move to dismiss on the ground that Binder is barred by the statute of limitations.

A. Statute of Limitations

In Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S. Ct. 2773 (1991), the Supreme Court established a uniform statute of limitations for federal securities claims brought under Section 10(b) and Rule 10b-5: such claims "must be commenced within one year after the discovery of the facts constituting the violation and within three years after such violation." Id. at 2782.[93] Congress thereafter amended the 1934 Act to provide that the uniform

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[92] Ernst was originally named as a defendant but was dismissed on November 19, 1993.

[93] The Court specifically adopted the language of Section 9(e) of the 1934 Act, 15 U.S.C. § 78i(s) which provides:

> No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation.

statute of limitations enunciated in Lampf applies to cases commenced after June 19, 1991. Section 27A of the 1934 Act, 15 U.S.C. § 78aa-l(a) states:

> The limitations period for any private civil action implied under Section 10(b) of this Act that was commenced an or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.

Therefore, because Binder was filed on September 22, 1992, the plain language of Section 27A mandates the application of the one year/three year statute of limitations to Binder. The Court rejects plaintiffs' argument that the pre-statute of limitation applies to Binder because Binder is based on Glavaris, a pre-Lampf case. See Durning v. Citibank Int'l, 990 P.2d 1133, 1138 (9th Cir. 1993) (courts must interpret and apply Section 27A in accordance with its plain meaning); Adler v. Berg Harmon Assoc., 790 F. Supp. 1235, 1238 (S.D.N.Y. 1992) ("The plain language of the statute [Section 27A] permits reinstatement only of claims commenced prior to June 20, 1991 and dismissed pursuant to Lampf and [James B. Beam Distilling Co. v. Geor 111 S. Ct. 2439 (1991)]."); In re Intecrrated Resources Real Estate Sec. Litigation, 815 F. Supp. 620, 643-44 (S.D.N.Y. 1993) appeal dismissed, 3 F.3d 49 (2d Cir. 1993) (because relation back must be permitted by a statute of limitations, court rejects argument that claims of plaintiffs added after June 19, 1991 relate back to the filing of the original complaint).

B. Application of the statute of limitations to the claims in Binder.

The claims in Binder are barred under both the one year and three year prongs of the statute of limitations.

1. One year prong

Under the "one year" prong of Lampf, litigation must be commenced within one year after the discovery of the facts constituting the violation. Since Lampf, courts interpreting the one year provision of Section 10(b) have consistently held that the limitations period begins to run upon constructive or inquiry notice of the facts constituting the violation.

For example, in Menowitz v. Brown, 991 F.2d 36, 41-42 (2d Cir. 1993), the Second Circuit specifically rejected the argument that actual notice is required to trigger the one year prong for a violation of Section 10(b). Rather, "'discovery' under the 1934 Act limitation provisions includes constructive or inquiry notice, as well as actual notice." Id. at 41. See also Anixter v. Home-Stake Production Co., 947 F.2d 897, 898-899 (loth Cir. 1991), later proceeding, 977 F. 2d 1533 (loth Cir. 1992), cert. denied, 113 S. Ct. 1841 (1993) (rejecting plaintiffs contention that the wording of Section 9(e) calls for actual notice to commence the statute of limitations under 10(b)); Cooke v. Manufactured Homes, Inc., 998 F.2d 1256, 1263 (4th Cir. 1993) (applying an inquiry notice standard for the commencement of the statute of limitations on a claim for violation of Section 10(b)); Tregenza V. Great American Communications Co., 12 F. 3d 717i 721-22 (7th Cir. Dec. 23, 1993), cert. denied, 114 S. Ct. 1837 (1994) (suits for violation of Section 10(b) and 9(e) incorporate the inquiry notice standard); Aizuss v. Commonwealth Equity Trust, 847

F. Supp. 1482, 1487 (E.D. Cal. 1993) (under the one year prong, claims made more than one year after plaintiffs should have discovered the potential causes of action are time barred).

Plaintiffs argue, without citing any authority, that the one year prong requires actual knowledge. Plaintiffs contend that the one year period must require "actual knowledge" because the Supreme Court held that "[t]he 1-year period, by its terms, begins after discovery of the facts constituting the violation, making tolling unnecessary." Lampf, 111 S. Ct. at 2782. Put differently, plaintiffs contend that tolling would be considered unnecessary only if the statute does not begin to run until plaintiffs actually know of the claim. However, the language in Lampf does not mandate actual knowledge by plaintiffs to trigger the statute of limitations. Rather, the language has been properly interpreted to mean that the one year statute of limitations does not begin to run until plaintiffs are on notice of their claim, but that inquiry notice is sufficient. See Trogenza v. Great American Communications Co., 823 F. Supp. 1409, 1415 (N.D. Ill. 1993) afffd 12 F. 3d 717 (7th Cir. 1993, Dec. 23, 1993) ("With respect to the one-year limit, equitable tolling is equally 'unnecessary' to either a subjective discovery or an objective discovery-inquiry notice limitation. . . . A party cannot both have inquiry notice and merit equitable tolling.").

The Binder Complaint alleges that the Binder Defendants violated Section 10(b) and Rule 10b-5 by making affirmative misrepresentations and omissions from October 20, 1987 through January 25, 1989, sometimes referred to as the "unsafe and unsound" period. The allegations in the Binder Complaint and in other documents filed by Bretz demonstrate that, at the very latest, plaintiffs were on inquiry notice of these claims by April 3, 1989.

The Binder Complaint states that [[o]n January 25, 1989, GFC finally issued a press release stating, in pertinent part that], [t]he regulators . . . advised that they consider Gibraltarts current financial condition to be "unsafe and unsound" due to capital levels and interest rate risk.

. . .

> [T]he Company has been advised by their auditors that they currently anticipate that their auditors' report on the in process audit of the company's 1988 financial statements will contain an explanatory paragraph discussing an uncertainty about the Company's ability to continue as a going concern for a reasonable period of time.[94]

The Binder Complaint further provides that "[o]n March 31, 1989, the Federal Home Loan Bank Board in Washington, D.C. (the "FHLBB"), based upon findings and conclusions submitted by the FHLB, ordered that Gibraltar Savings be seized by the Federal Deposit Insurance Corporation ("FDIC") as agent for the FHLBB and placed in a Government conservatorship."[95]

Finally, the Neubronner Complaint recites that "[o]n April 3, 1989, the Wall Street Journal reported that the Government's takeover of Gibraltar confirms that GFC's shareholder have been 'wiped out'!"[96]

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[94] Binder Complaint ¶¶ 92-93.

[95] Id. at ¶ 95.

[96] Neubronner Complaint at ¶ 15.

Therefore, giving the plaintiffs the best of it, plaintiffs were at least on inquiry notice of claims related to alleged fraud perpetrated from October 20, 1987 through January 25, 1989 on April 3, 1989 when the takeover of Gibraltar Savings by the FSLIC had been fully publicized.[97] See MOD at 26. Because Binder was filed on September 22, 1992, nearly three-and-a-half years later, all claims for violation of Section 10(b) and Rule 10b-5 are time-barred under the one year prong of Lampf.

2. Three year prong

The three year period of repose enunciated in Lampf is an absolute limitation: litigation must be commenced within three years after a violation of Section 10(b). Lampf, 111 S. Ct. at 2782. This rule raises the issue of whether a "violation" occurs at the time a misrepresentation is made, or at the time a purchase is made based on that misrepresentation. In Lampf, the Court ruled that plaintiffs' claims were brought more than three years after the defendant's alleged misrepresentations, and were therefore untimely. Id.

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[97] In opposition to the Binder Defendants' motions to dismiss, plaintiffs attack the principle of using inquiry notice, however plaintiffs never allege a specific date after which they were on 'actual notice' of the claims in Binder. Instead, plaintiffs simply argue that defendants continued to lull shareholders into believing no fraud had occurred even after April 3, 1989. Surely plaintiffs would have to concede that they were on 'actual notice' of their claims at the time Glavaris was filed on November 16, 1990. Nevertheless, Binder was not filed until two years later.

Some courts have followed the implication from Lampf that the three year period begins to run at the time a misrepresentation is made. See In re Melridge, Inc. Securities Litigation, 1991 U.S. Dist. LEXIS 16375 *10-16 (D. Or. Oct. 30, 1991) (claims based on misrepresentations made in a prospectus issued more than three years before suit was brought are barred by the three year statute of limitations).

Other courts have held that the three year period begins to run on the date the sale of the instrument is completed. Aizuss v. Commonwealth Equity Trust, 847 F. Supp. 1482, 1486 (E.D. Cal. 1993) (the three year period of repose is a bar to any action brought more than three years after the sale or purchase of the securities at issue).

The Ninth Circuit seems to adopt a combination of the two approaches. In Durning v. Citibank, Int'l, 990 F. 2d 1133, 1136 (9th Cir. 1993) the Ninth Circuit held that

> [t]he [plaintiffs'] securities fraud claim arose in 1981, when the Official Statement allegedly misrepresented the bonds' redemption dates and the bonds were purchased. See Continental Bank, Nat'l Ass'n v. Village of Ludlow, 777 F. Supp. 92, 102 (D. Mass. 1991) (Lampf's three year period of repose begins when the last alleged misrepresentation was made' by the defendants); see also McCool v. Strata Oil Co., 972 P.2d 1452, 1460 (7th Cir. 1992) ("In securities fraud cases, the federal rule is that the plaintiff's cause of action accrues 'on the date the sale of the instrument is completed.'").

Durning appears to dictate that the three year period of repose begins to run on the date that a security is purchased based on an alleged misrepresentation. Although the statute of limitations may in fact begin at the time each

misrepresentation was allegedly made, this Court will apply the date at which a purchase was made for the purpose of the analysis which it makes here.

In the Binder case, Fidel purchased GFC common stock between January 22, 1986 and May 9, 1988. Because Binder was filed on September 22, 1992, claims for violation of Section 10(b) and Rule 10b-5 based on these purchases are clearly barred by the statute of limitations which ran for each of the purchases in the period of time between January 21, 1989 and May 8, 1991. Moreover, because Fidel did not opt out of In re Gibraltar, Fidel is precluded from recovery against Young and Nussbaum on a claim for violation of Section 10(b) and Rule 10b-5 based on purchases of GFC common stock, as the identical claims were settled In re Gibraltar.

Fidel also purchased GFC debentures between July 6, 1987 and February 5, 1988. The statute of limitations on claims based on these purchases ran in the period of time between July 5, 1990 and February 4, 1991. Because Fidel did not file his claims Until September 22, 19920 these claims are also untimely.

Binder purchased GFC debentures on the following four dates: November 9, 1987, December 28, 1987, November 29, 1988 and December 7, 1988. The three year statute of limitations for claims based on each of these purchases ran on November 8, 1990, December 27, 1990, November 28, 1991 and December 6, 1991, respectively. Because Binder was not filed until September 22, 1992, Binder's claims are barred by the statute of limitations.

In sum, applying both the one year and three year prongs of Lampf, all of the claims in Binder are barred by the statute of limitations.

C. Tolling

In Lampf, the Supreme Court specifically held that the statute of limitations is not subject to the doctrine of equitable tolling. Lampf, 111 S. Ct. at 2782. Therefore, the Court rejects any assertions that plaintiffs have made in the Complaint and in their papers that equitable tolling should apply in this case.

In this regard, plaintiffs' principal argument is that under American Pipe the filing of Glavaris on November 16, 1990 tolled the statute of limitations in Binder. Put simply, plaintiffs contend that the filing of a putative class action in Glavaris tolled and continues to toll the statute of limitations for class members who either move to intervene in Glavaris or who file separate actions based on claims in the original class action. This contention raises three issues: (1) should American Pipe tolling apply in this circumstance?; (2) if American Pipe tolling applies, does it toll claims for another class action based on the previous putative class action?; and (3) if American Pipe tolling applies, when is the tolling out off?

1. Should American Pipe tolling apply in this circumstance?

In American Pipe, 414 U.S. 538, 552 (1974), the Supreme Court held that . . . Supreme Court held that [d]uring the pending . . . of the District Court's determination [of class action status], which is to be made 'as soon as practicable after the commencement of an action.' potential class members are mere passive beneficiaries of the action brought in their behalf. Not until the existence and limits of the class have been established and notice of membership has been sent does a class member have any duty to take

> note of the suit or to exercise any responsibility with respect to it in order to profit from the eventual outcome of the case.

The Court concluded:

> We hold that . . . the commencement of the original class suit tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status.

Id. at 552-53. Therefore,

> the commencement of a class action suspends the applicable statute of limitations as to all members of the class who would have been parties had the suit been permitted to continue as a class action.

Id. at 554. As discussed above, the Court reasoned that the tolling doctrine advances the function of a class action as an efficient method for the adjudication of a controversy by numerous class members. To hold otherwise would require individual class members to file individual motions to intervene or individual lawsuits in order to preserve the statute of limitations. Id. at 551.

The Binder plaintiffs rely on the language from American Pipe to argue that the filing of Glavaris as a putative class action for the class period January 1, 1986 through April 30, 1989 tolled the statute of limitations as to putative class members. Because the Glavaris plaintiffs have not made a motion for class certification, and because this Court has not formally decertified Glavaris as a class action, it is plaintiffs' position that the Glavaris action continues to toll the statute of limitations up to the present time.

Plaintiffs' argument that as long as Glavaris remains a "putative" class action, the claims of putative class members are "saved" by the tolling doctrine has a surface appeal. However, stating plaintiffs' proposition this way reveals that plaintiffs must be wrong. The determination of class certification is supposed to cut off tolling; however, where, as here, no motion has been made for class certification, plaintiffs, argument suggests that a class action tolls the claims of putative class members indefinitely. Glavaris was filed three-and-a-half years ago and according to plaintiffs is still a "putative" class action. As discussed in Part II above, the Glavaris action is nothing more than a putative class action that could never represent the claims of the Binder plaintiffs because of the prior settlement of In re Gibraltar, and the trading histories of the named plaintiffs in Glavaris, the only valid claims in Glavaris are a few individual claims by John Glavaris against Young, and a potential class claim for a proxy violation. Binder was filed almost two years ago and according to plaintiffs is still a putative class action. However, the Binder plaintiffs have not moved for class certification, and, as discussed in Part III, will be unlikely to qualify for class certification if such a motion is made. Nevertheless, under plaintiffs' proposed interpretation of American Pipe, the claims of all putative members of both Glavaris and Binder actions are tolled. Were class members to file another class action based on Glavaris and Binder, plaintiffs would likely argue that the statute of limitations is still tolled as to those claims.

Clearly, plaintiffs' interpretation of American Pipe would not promote the efficient adjudication of any controversy framed as a class action. To the contrary, plaintiffs' method of pleading abuses the class action procedure and the tolling doctrine. Concerned about precisely this type of abusive pleading, Justice Blackman commented: "Our decision . . . must not be regarded as encouragement to

lawyers in a case of this kind to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights." American Pipe, 414 U.S. at 561 (Blackman, J. concurring).

Accordingly, the Court concludes that under these circumstances, the American Pipe doctrine does not apply to toll the statute of limitations for the claims in Binder.

2. If American Pipe tolling applies, does it toll claims for another class action based on the previous putative class action?

Even if the American Pipe tolling doctrine were to apply to the claims in Binder, it would not toll the class claims. As discussed in Part II(A)(1)(a)(ii), the policy considerations underlying the tolling doctrine in American Pipe do not apply to class members who file subsequent class actions. Robbin v. Fluor Corp., 835 F.2d 213, 214 (9th Cir. 1987). See also Korwek V. Hunt, 827 F.2d 874, 878 (2nd Cir. 1987) ("the tolling rule . . . was not intended to be applied to suspend the running of statutes of limitations for class action suits filed after a definitive determination of class certification"); Salazar-Calderon v. Presidio Valley Farmers Ass'n, 765 F.2d 1334, 1351 cert. denied, 475 U.S. 1035 (1986) ("putative class members may [not] piggyback one class action onto another and thus toll the statute of limitations indefinitely"); Sandi Smith v. Flagship Int'l, 609 F. Supp. 58, 64 (N.D. Tex. 1985) (To allow tolling of class claims "would allow the attorney for a class to revive the class claims upon denial of certification by simply refiling a new class action using a different putative class member as representative. The attorney would be able to bring a potentially endless succession of class actions . . . . ").

The Court concludes that the statute of limitations is not tolled as to the class claims in Binder and the claims are therefore time-barred.

3. If America Pipe tolling applies, when is tolling cut off?

Even if American Pipe tolling were to apply to the individual claims in Binder, the claims would not remain tolled indefinitely. The Glavaris plaintiffs have not brought a motion for class certification. However, on August 30, 1991, Binder and Fidel brought a motion to intervene in Glavaris on the ground that "the interests of the unnamed class members in the putative plaintiff class may no longer be adequately protected by the named class representatives.[98] In fact, the interests of the unnamed class members in Glavaris were never adequately represented by the named class representatives. By August 30, 1991, at the latest, Binder and Fidel realized this. At that point, Binder and Fidel recognized the limits of the Glavaris class and could not have been under the impression that they were "passive beneficiaries of the action brought in their behalf." American Pipe, 414 U.S. at 552. Therefore, any tolling of the statute of limitations ended on August 30, 1991.

Binder was filed on September 22, 1992. Assuming arguendo that American Pipe tolling applies between November 16, 1990 and August 30, 1991, the Court now analyzes whether the individual claims in Binder are timely.

As stated in Part III(A), the one year/three year rule enunciated in Lampf requires that each of the claims asserted by Binder and Fidel must have been brought within one year

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[98] Binder and Fidel's notice of motion to intervene at 2 filed August 30, 1991

of discovery of the facts constituting the violation and within three years after such violation.

a. One year prong

As discussed in Part IV(B)(1), the one year statute of limitations for the claims in Binder began to run on April 3, 1989. Glavaris was not filed until November 16, 1990, more than one year later. Accordingly, one could argue that the claims in Binder were already barred before Glavaris was filed.

However, Lampf changed the statute of limitations for cases filed after June 19, 1991. Assuming that the claims in Binder were tolled by Glavaris at the time Lampf was decided, one could also argue that the Binder plaintiffs should have one year from the date that tolling ended in which to file individual claims. At the time tolling ended, plaintiffs were subject to a "one year from discovery" statute of limitations. Applying this rule, the Binder claims are still untimely: Binder was filed on September 22, 1992, more than one year after tolling ended on August 30, 1991.

Therefore, whether the Court measures one year from the time plaintiffs were on inquiry notice of their claims on April 3, 1989, or one year from the time that tolling ended, plaintiffs' claims are time-barred.

b. Three year prong

Plaintiffs are also barred under the three year prong of Lampf. As stated, the three year statute of limitations begins to run on the date of purchase of the security. Therefore, the Court must again examine each plaintiff's purchases.

i. Fidel

Fidel's claims against Young for alleged violations of Section 10(b) and Rule 10b-5 based on purchases of GFC common stock were released in the In re Gibraltar settlement, in which Fidel received approximately $250,000. Accordingly, those claims are wholly barred.[99]

Fidel last purchased GFC common stock on May 9, 1988. Therefore, the statute of limitations continued to run from May 9, 1988 until November 15, 1990 (2 years, 6 months, and 7 days). Even if Fidel's claims against the defendants other than Young were tolled from November 16, 1990 through August 30, 1991, on that date the statute of limitations commenced to run again, and ran until Binder was filed on September 22, 1992 (1 year and 23 three years and seven months had elapsed. Accordingly, Fidel's claims based on purchases Of GFC common stock are time-barred.

Fidel last purchased GFC debentures on February 5, 1988. Therefore, the statute of limitations ran from February 5, 1988 until November 15, 1990 (2 years, 9 months, and 11 days). Even if Fidel's claims against the defendants other than Young were tolled from November 16, 1990 until August 30, 1991, on that date the statute of limitations commenced to run again, and ran until Binder was filed on September 22, 1992 (1 year and 23 days). Therefore, at the time Fidel ultimately filed his claims, more than three years and ten months had elapsed. Accordingly, Fidel's claims based on purchases of GFC common stock are time-barred.

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[99] Fidel also released his claims against Nussbaum and GFC in the In re Gibraltar settlement. However, Nussbaum has been dismissed from Binder and GFC is not named as a defendant in the Binder action.

ii. Binder

Binder did not purchase any GFC common stock. Binder made four purchases of GFC debentures, the last of which occurred on December 7, 1988. Therefore, the statute of limitations ran from December 7, 1988 until November 15, 1990 (1 year and 344 days). Even if Binder's claims were tolled from November 16, 1990 to August 30, 1991, on that date the statute of limitations commenced to run again, and ran until Binder was filed on September 22, 1992 (1 year and 23 days). Therefore, at the time Binder ultimately filed his claims, three years and two days had elapsed. Accordingly, Binder's claims are time-barred.[100]

4. Summary of tolling analysis

The Court concludes that American Pipe tolling should not apply to any of the claims in Binder. However,

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[100] Moreover, the Court questions whether Binder actually incurred any loss on his last purchase of GFC debentures. On December 7, 1988 Binder purchased $20,000 face amount GFC 9-1/4% debentures for $4,152. In the statement of plaintiffs, purchases and sales, plaintiffs do not clearly show which debentures plaintiffs sold on particular dates. However, the introductory paragraph says that "[o]n February 27, 1989, Plaintiff Binder sold $20,000 Face Amount of GFC 9-1/4's for $4,548." If Binder sold the debentures that he purchased on December 7, 1988, then he had a profit of $396 on the sale. Therefore, Binder suffered no damages from the purchase on December 7, 1988 and cannot state a claim for violation of Section 10(b) based on that purchase.

even if American Pipe tolling does apply to Binder, it cannot toll any of the class claims. Moreover, even if American Pipe tolling applies to toll the individual claims of Fidel and Binder, their claims are barred under both the one year and three year prongs of the statute of limitations. Therefore, all of the claims in Binder are barred by the statute of limitations.

D. Additional considerations.

1. Claim for aiding and abetting a violation of Section 10(b)

The claim for aiding and abetting a violation of Section 10(b) is dismissed with prejudice. Central Bank v. First Interstate Bank, 114 S. Ct. 1439 (1994) (a private plaintiff may not maintain a claim for aiding and abetting under Section 10(b)).

2. Federal Rule of Civil Procedure 9(b).

All claims for violation of section 10(b) must satisfy Federal Rule of Civil Procedure 9(b) ("Rule 9(b)") which requires that fraud be pleaded with particularity. In re GlenFed Inc. Securities Litigation, 93 Daily Journal D.A.R. 16281, 16282 (9th Cir. Dec. 22, 1993). Incredibly, counsel for plaintiffs represented to this Court that "the 9th Circuit has never had the represented to this court that "the 9th Circuit has never had the occasion to actually address, analyze and determine for purposes of making a holding in any case involving Rule 10b-5 whether or not the pleading requirements for common law 'fraud' under Rule 9(b) were intended to or otherwise should apply to Rule 10b-5

claims."[101] Not only has the Ninth Circuit specifically held that Rule 9(b) does apply to Section 10(b) claims, but Bretz has had personal experience with the application of this rule. In Neubronner v. Milken, 6 F.3d 666 (9th Cir. 1993), Bretz represented Neubronner in a claim against Michael Milken alleging a violation of Section 10(b) and Rule 10b-5. After plaintiff had numerous opportunities to properly plead his claim, the Ninth Circuit affirmed the dismissal with prejudice of plaintiff's fifth amended complaint for failure to comply with Rule 9(b). Id. at 671-72. Therefore, Bretz's contention that Rule 9(b) may not apply in Section 10(b) cases is not only wrong, but could well be sanctionable. See U.S. v. Strongfellow, 911 F.2d 225, 226 (9th Cir. 1990) (if the omitted case law would render the attorney's argument frivolous, he should not be able to proceed with impunity in real or feigned ignorance of it, and sanctions should be upheld).

All of the Binder Defendants have moved to dismiss for failure to comply with Rule 9(b). Rule 9(b) has been flagrantly violated here, but because all of the Binder claims are barred by the statute of limitations, the Court need not consider the motions to dismiss on this ground.

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[101] Plaintiffs' Separate Opposition to Defendants Rifkind, Pondel & Parsons and Melvin Rifkind's Motion to Dismiss at 13-14 (filed February 7, 1994). See also Plaintiffs, Opposition to Defendant RTC/Gibraltar's Motion to Dismiss Plaintiffs' First Amended Complaint at 15 n. 17 ("the question as to whether or not Rule 9(b)'s "fraud with particularity" requirement even applies to a Rule 10b-5 claim has never been addressed and finally decided by the Ninth Circuit").

V. CONCLUSION

In Glavaris there remains one putative class claim for a proxy violation against defendants Young, Thayer, Janis, Williamson, Sprague, Hutter, Spitz and Vega based on the allegation that the 1987 Proxy Statement failed to disclose that the FHLBB was demanding that GFC maintain the minimum regulatory capital required for Gibraltar savings and that Gibraltar savings not pay cash dividends to GFC in excess of 50% of Gibraltar Savings' annual income; John Glavaris' individual claims against Young for violation of Section 10(b) and Rule 10b-5. breach of fiduciary duty based on a fraud theory, fraud and deceit, and negligent misrepresentation also remain. The Binder action is dismissed in its entirety with prejudice.

DATED: AUGUST 10, 1994

/s/MARIANA R. PFAELZER
Mariana R. Pfaelzer
United States District Judge

APPENDIX

Time Line for Glavaris and Binder

Date	Description of Event	Nature
1/1/86	GLAVARIS CLASS BEGINS	
1/22/86	Fidel's first purchase of GFC common stock	BUY
1/86	1985 Annual Report states Outlook favorable, continue asset growth, look forward to another successful performance in 1986.	Misrep (General)
	10-K states "real estate ("RE") investments carried at lower of cost or net realizable value"	Misrep (RE)
3/86	1985 financials: Audited by Ernst presented clean opinion (1/86)	Misrep (RE/GAAP)
4/86	Prospectus re:GFC 7-1/2's indicates "RE investments caried at lower of cost or net realizable value"	Misrep (RE)

8/86	Peat replaces Ernst as GFC's auditor Glavaris purchases GFC stock	BUY
8/1/86	John Glavaris ("Glavaris") purchases GFC common stock	BUY
8/4/96	Patricia Glavaris purchases GFC 9-1/4% convertible subordinated debentures ("GFC 9-1/4)	BUY
8/5/86	Glavaris purchases GFC 9-1/4's	BUY
8/6/86	Glavaris purchases GFC 9-1/4's	BUY
8/7/86	Glavaris purchases GFC 9-1/4's	BUY
8/8/96	Glavaris purchases GFC 9-1/4's	BUY
8/18/86	Glavaris purchases GFC 9-1/4's	BUY
9/86	GFC learns that Galleria appraisal would reflect $30M loss.	Omission (RE)
10/1/86	Glavaris purchases GFC 9-1/4's	BUY
12/86	Prospectus re: GFC 13-7/8's includes 1985 financials, 10-K	Misrep
12/10/86	Glavaris purchases GFC 9-1/4's	BUY
12/11/86	Glavaris purchases GFC 9-1/4's	BUY

12/12/86	Glavaris purchases GFC 9-1/4's	BUY
12/18/86	Glavaris purchases GFC 9-1/4's	BUY
1/2/87	Tolley purchases GFC 9-1/4's	BUY
1/21/87	Year end press release: 50% dividend increases and "record earnings"	Misrep (General)
1/26/87	1986 Annual Report: Earnings up 1986 year end results Include $34M in loan losses and $33M in Re operations losses (on investment made prior to 1985)	Misrep (General)
	GFC represents that net effect of writedowns would be "substantial reduction in the provision for losses and interest expense in 1987 and beyond"	Misrep (RE)
	Young letter to stockholders states: "Outlook positive" for 1987, Healthy RE market and commitment to achieve major expansion of RE in CA and WA	Misrep (General)
2/6/87	Law firm representing GCB, Inc. investigation into claims of mgt malfeasance undertakes and misfeasance involving Galleria [Disclosed in Stahl]	Omission (RE)
2/11/87	Glavaris purchases GFC 9-1/4's	BUY
2/12/86	Glavaris purchases GFC 9-1/4's	BUY

2/20/87	Glavaris purchases GFC common stock	BUY
2/25/87	Mgt informed GCB, Inc. to retain counsel re:partnership litigation [Disclosed in Stahl]	Omission (Proxy)
3/5/87	Glavaris & Tolley sell GFC 9-1/4's	SELL (no loss)
3/87	1986 Financial presented: Audited by Peat--clean opinion (1/87)	Omission
3/13/87	Partnership litigation filed	Disclose
4/87	"Bogus" version of 1986 mission Financials--treated investment	Ommission (RE) long-term
	Proxy statement furnished to shareholders: (1) limit director liability; (2) approve indemnity agreement; (3) approve FSB acquisition	
	Gibraltar states that not aware of any actions currently pending or threatened against directors/officers	
	Omission: (1) potential claims against mgt; (2) losses in RE and mortgage-backedecurities; (3) 2 versions of the 1986 financials; (4) FHLBB objections to	Omission (Proxy)

	FSBF accession and CMA; (5) competence of Board nominees	
	[John Glavaris is only rep. holder of common stock]	
5/1/87	Glavaris purchases GFC 9-1/4's	BUY
5/6/87	Glavaris purchases GFC 9-1/4's	BUY
5/12/87	Glavaris purchases GFC 9-1/4's	BUY
5/15/87	Glavaris purchases GFC 9-1/4's	BUY
5/14/87	Stahl lawsuit filed for unlawful solicitation of Proxies, based on misreps in 1987 Proxy statement which included Galleria problems, potential lawsuits against GFC mgt [Bretz counsel]	Disclose
5/15/87	Glavaris purchases 9-1/4's	BUY
5/22/87	1987 Annual Meeting: Young states sound financial condition and future prospects favorable	Misrep (General)
7/87	GFC persuades FHLBB to allow it to make $116M purchase of FSB for 100% cash	Omission
7/6/87	Bernard Fidel purchases GFC 9-1/4's	BUY
9/30/87	Glavaris purchase GFC 9-1/4's	BUY
10/20/87	FHLBB notifies Gibraltar it is unsafe and unrealized loss of $500M	Omission (Proxy)

10/20/87	BINDER CLASS BEGINS	
10/30/87	Investment community shocked by disclosure of 3rd Q loss of $154.6M--one GFC of the largest losses of publicly-owned thrift institutions in history. Indicates results for commercial banking and high-risk RE acquisitions. Result: (1) Suspend Dividend; (2) Lower credit ratings; (3) Forced to put up for sale moneycenter to raise capital P argues this is misrep since really incurred during 1985-87	Disclose (Misrep)
11/1/87	Price of GFC stock plummets Market Reflects	Disclosure
11/2/87	Wall Street Journal and NY Times Articles publicizing loss announced 10/30, largely because of "bad" Re projects	Disclose
11/4/87	Glavaris purchase GFC commonstock	BUY
11/9/87	Joel Binder ("Binder") purchases 9-1/4's	BUY
11/13/87	10-Q Report for period ending confirms losses	Disclosure
11/17/87	Weinberger lawsuit filed in State court	Disclosure

11/23/87	Model Assoc., Inc. filed in Federal Court later consolidated with Lifshitz, Winard, Greenman, and Seidner as In re Gibraltar Corporation Securities Litigation ("In re Gibraltar")	Disclosure
12/15/87	Mgt with FHLBB--concerned with condition of GFC, severe financial problems (FHLBB)	Omission
2/28/87	Binder purchases GFC 9-1/4's	BUY
In 1987	Dudley retires form Ernst; Ernst 1/86 opinion republished in filings	Misrep (RE)
1/29/88	Press Release: 1988 should be profitable year Young letter states that notwithstanding loss in 1987. Gibraltar is in sound condition and capital ratios of S&L subs remain in excess of regulatory limits	Misrep (General)
2/1/88	Bernard & Hilda Fidel purchase GFC 9-1/4's	BUY
2/3/88	Bernard & Hilda Fidel purchase GFC 9-1/4's	BUY
2/4/88	Bernard & Hilda Fidel purchase GFC 9-1/4's	BUY
2/5/88	Bernard & Hilda Fidel purchase GFC 9-1/4's	BUY
2/23/88	Bernard & Hilda Fidel purchase GFC 9-1/4's	BUY

3/88	GFC announces retirement of Young, Williamson, Nussbaum	
3/88	1987 Financial presented: fraud Audited by Peat--clean opinion alleged	No
3/18/88	Closed Moneycenter with $20M write-off	
4/88	1988 Proxy Statement No affected voting alleged	
	Omissions: (1) Claims against directors; (2) FHLBB criticisms; (3) competence of Board nominees	Omission (Proxy)
	[John Glavaris is only rep. holder of common stock]	
5/9/88	Fidel's last purchase of GFC common stock	BUY
5/20/88	New Pres. Thayer states condition no additional major surprises expected, do not face govt. take-over, expect profit by 4th Q.	Misrep (Gen.)
9/88	GFC announces settlement of shareholder derivative suit, and asserts no wrongdoing found by special committee	Misrep
11/2/88	Glavaris sells GFC 9-1/4's	SELL (loss)
11/3/88	Glavaris sell GFC 9-1/4's	SELL (loss)

11/29/88	Binder purchases GFC 9-1/4's	BUY
12/7/88	Binder purchases GFC 9-1/4's	BUY
12/12/88	Tolley sells GFC 9-1/4's	SELL (loss)
1/89	GFC reported to be unsafe	Disclosure
1/25/89	BINDER CLASS ENDS	
2/27/89	Binder sells GFC 9-1/4's	SELL (profit?)
3/89	1988 Financials indicate loss of $101 M Audited by Peat	Disclosure
3/13/89	Binder sells GFC 9-1/4's	SELL (loss)
3/30/89	FSLIC appointed conservator of GFC continues denial of wrongdoing	Gibraltar-- Disclosure (Misrep)
4/89	Gibson reasserts no wrongdoing by stabilized, management fund by special committee	Misrep
4/30/89	GLAVARIS CLASS ENDS	
6/2/89	Neubronner v. Young, et al filed in Federal Court [Bretz is counsel]	Disclosure
6/23/89	Tolley sells GFC 9-1/4's	SELL (loss)

6/30/89	Glavaris sells GFC 9-1/4's	SELL (loss)
6/30/89	Patricia Glavaris sells GFC 9-1/4's	SELL (loss)
6/30/89	Glavaris purchases GFC 13-3/4's	BUY

7/28/89 Glavaris filed request for exclusion from In re Gibraltar and indicates will file own suit

9/13/89 In re Gibraltar settled and final judgement entered; class covers common stock purchasers from 1/23/86-3/31/89. Settles claims against defendants Gibraltar Financial Corporation, Herbert Young and Jerome Nussbaum for violation of Section 10(b) and Rule 10b-5, and state law claims for fraud and deceit and negligent misrepresentation

11/16/90 Glavaris filed in Federal Court.
Class Period: 1/1/86 - 4/30/89
[Bretz is counsel]

11/20/91 Lampf decided

8/30/91 Binder and Fidel bring motion to intervene in Glavaris

9/22/92 Binder v. Young, et al. filed in Federal court.
Class Period: 10/20/87 - 1/25/89
[Bretz is counsel]

11/2/93 Neubronner settled. As part of settlement, defendants Nussbaum and Harrison are dismissed from Glavaris and Binder

12/14/93 Fidel et al. v. National union Fire Insurance et al. filed in Federal court
[Bretz is counsel]

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOHN GLAVARIS AND PATRICIA GLAVARIS; BENNY L. TOLLEY in their individual capacities
and on behalf ofall persons similarly situated
Plaintiffs

v.

HERBERT J. YOUNG, JAMES N. THAYER, JAY JANIS, JOHN R. WILLIAMSON, JEROME NUSSBAUM, MICHAEL W. MOONEY, LYNNE CRAWFORD, LINDA K. S. BLOUNT, ROBERT R. SPRAGUE, HOUSTON I. FLOURNOY, BERNICE HUTTER, MELVIN P. SPITZ, RAFAEL E. VEGA, RICHARD M. POST, JAMES R. BOYLE, WARREN P. GLUPKER, SUSAN RAWLINGS, DEAN W. HARRISON, GIBRALTAR SAVINGS, GIBRALTAR SAVINGS, F.A., MELVIN RIFKIND, RIFKIN D, PONDEL & PARSONS, WILLIAM H. DUDLEY, ERNST & WHINNEY, ERNST & YOUNG, ALVIN KANG, PEAT MARWICK MITCHELL & CO., PEAT MARWICK MAIN & CO., KPMG PEAT MARWICK, RICHARD SPRAYREGEN, KENNETH LEVENTHAL & CO., and GIBSON DUNN & CRUTCHER,HERBERT J. YOUNG, et al.,
Defendants

CASE NO. CV-90-6185 MRP

SECOND AMENDED CLASS ACTION COMPLAINT FOR FRAUD AND DECEIT, CONSTRUCTIVE FRAUD AND DECEIT, BREACH OF FIDUCIARY DUTY, BREACH OF STATUTORY DUTY, NEGLIGENCE, NEGLIGENT MISREPRESENTATION, SECURITIES FRAUD AND RICO

FILED JUNE 24, 1991
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THE PLAINTIFFS AND EACH OF THEM HEREBY STATE AS THEIR COMPLAINT, THE FOLLOWING:

INTRODUCTION AND GENERAL ALLEGATIONS

1. During the period January 1, 1986 through approximately April 30, 1989 Gibraltar Financial Corporation and its wholly owned subsidiary Gibraltar Savings (collectively herein sometimes referred to as Gibraltar or the "company") made fraudulent and false and misleading public representations, statements and assurances affecting the offer, sale, purchase, trading in and ownership of the securities of GFC and Gibraltar Savings. GFC and Gibraltar Savings' wrongful and actionable conduct was caused by the management of such corporations who, themselves, were the ones who made such fraudulent and false and misleading statements. GFC and Gibraltar Savings, accountants, auditors, lawyers and financial public relations advisors made, and participated with and knowingly and substantially assisted GFC and Gibraltar Savings' management in the making of fraudulent and false and misleading statements affecting Gibraltar's securities. Furthermore, GFC and Gibraltar Savings' accountants, auditors, attorneys and financial public relations advisors were extremely reckless and negligent in the making, issuance, and giving of reports, opinions and advice concerning GFC and Gibraltar savings and otherwise in respect of the so called professional services rendered to GFC and Gibraltar savings and their securities holders by such persons and their firms affecting the offer, sale, purchase and trading in and the ownership of the securities of Gibraltar. As a result of such wrongful and actionable conduct, GFC and Gibraltar savings were able to and did in fact cover up, hide and conceal from the public trading markets for their securities, and from the individual investors who owned and traded in the securities of Gibraltar, the fact that Gibraltar's management was not competent to manage the business and affairs of Gibraltar, Gibraltar's savings and loan business was not profitable, that general and administrative expenses exceeded operating revenues, that Gibraltar had embarked upon an ill-conceived program of commercial real estate lending and investment which had resulted in substantial unreported losses in excess of a quarter of a billion dollars, that (contrary to Gibraltar's representation that it would concentrate on variable rate mortgage

loans) Gibraltar had acquired a substantial portfolio of fixed rate mortgage-backed securities and "junk" bonds which had resulted in unreported losses of hundreds of millions of dollars, and that Gibraltar's capital and liquidity were impaired and were not adequate to support Gibraltar's dividend and acquisition policies and programs, and threatened Gibraltar's continuation as a going concern -- all of which had resulted in very serious adverse determinations by the Government agencies responsible for auditing and regulating Gibraltar's savings and loan business and culminating in the actual seizure of Gibraltar Savings by the Government, the bankruptcy of GFC and, in most instances, the total loss of investment capital by all persons who had purchased the securities of GFC and Gibraltar Savings. By this action, Plaintiffs seek to hold legally and financially accountable and responsible all those persons and firms whose conduct was wrongful and actionable and caused the loss of such investors' savings/investment capital.

II.

JURISDICTION

2. This Court has exclusive jurisdiction of various of the actions constituting this Complaint under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78a et seq. (herein the "1934 Act" or the Securities Exchange Act"), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5, and under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964 et seq. (herein "RICO").

3. Venue in this Court is proper because the actions, conduct and transactions complained of herein occurred in substantial part in the Central District of California and all of the defendants reside, are found in and/or transact business in the Central District of California. 15 U.S.C. 78aa; 18 U.S.C. § 1965.

III.
PLAINTIFFS

4. John and Patricia Glavaris are individuals resident in the state of Virginia (herein collectively referred to as "Glavaris"). Glavaris has suffered injury and damages in respect of the purchase of the securities of GFC, including 15,000 shares of GFC's Common Stock in the approximate amount of $147,500 and $670,000 in face amount of Gibraltar's 9-1/4% Convertible Subordinated Debentures due 2008 (herein referred to as the "GFC 9-1/4's"), during the period covered by this Complaint.

5. Benny L. Tolley is an individual resident in the state of Virginia ("Tolley"). Tolley has suffered injury and damages in respect of the purchase of $100,000 in face amount of GFC 9-1/4's during the period covered by this Complaint.

6. In addition to their individual claims as set forth in this Complaint, the Plaintiffs through this action seek to represent the interests of all persons similarly situated as more fully set forth under "class Action Allegations" which follows as Section V of this Complaint.

IV.
DEFENDANTS

7. Defendant Herbert J. Young ("Young") commenced his employment with Gibraltar Savings in 1952 and at various times during-the period covered by this Complaint served as the Chairman-of the Board, Chief Executive Officer and President of GFC, Gibraltar Savings and subsidiaries and affiliates thereof. Total cash compensation paid by GFC and/or Gibraltar Savings to Mr. Young during the last year of his employment in 1988 was in excess of $1.5 million.

8. Defendant James N. Thayer ("Thayer") has served as a member of the Board of Directors of GFC and Gibraltar Savings since 1976, and he also served on the GFC and Gibraltar Savings' Joint Audit Committee. Mr. Thayer was a member of GFC's Special Corporate Policy Committee subsequently renamed the Special Litigation Committee. In March of 1988, Mr. Thayer became GFC and Gibraltar Savings' President and Chief Executive Officer.

9. Defendant Jay Janis ("Janis") has served as a member of the Board of Directors and Chairman of the Executive Committee of GFC and Gibraltar Savings since 1982. In March of 1988, Mr. Janis became the Chairman of the Board of Directors of GFC and Gibraltar Savings. Mr. Janis served as Chairman of the Federal Home Loan Bank Board in Washington, D.C. from 1979-1980.

10. Defendant John R. Williamson ("Williamson") served as an officer of GFC beginning in 1961, and at various times Mr. Williamson served as a member of the Board of Directors, Chief Financial Officer, Executive Vice President and Chief Administrative Officer of GFC and/or Gibraltar Savings.

11. Defendant Jerome Nussbaum ("Nussbaum") served as Executive Vice President and Chief Financial officer of GFC, and President and Chief Operating Officer of Gibraltar Savings. During the period covered by this Complaint, Mr. Nussbaum was responsible for and supervised GFC and Gibraltar Savings' financial public relations and investor relations and communications departments and activities. Mr. Nussbaum was formerly associated for ten years with the public accounting firm of Peat Marwick Mitchell & Co. which accounting and auditing firm became GFC's purported independent accountants/auditors shortly after Nussbaum joined GFC; and which accounting and auditing firm is also named as a defendant in this action.

12. Defendant Michael W. Mooney ("Mooney") served as Treasurer of GFC and Executive Vice President and Chief

Financial Officer for Gibraltar Savings. He previously also served as Senior Vice President and Controller of Gibraltar savings.

13. Defendant Lynne Crawford ("Crawford") served as Senior Vice President and Controller of Gibraltar Savings, Vice President of Gibraltar Management of Properties, Inc. and an officer and director of one or more of GFC and/or Gibraltar Savings' other subsidiaries and/or affiliates.

14. Defendant Linda K. S. Blount ("Blount") served as Vice President-Investor Relations and Corporate Communications of and for GFC and Gibraltar Savings.

15. Defendant Robert R. Sprague ("Sprague") served as a member of the Board of Directors of GFC and Gibraltar Savings since 1971, and Vice Chairman of the Board of GFC since 1982.

16. Defendant Houston I. Flournoy ("Flournoy") served as a member of the Board of Directors of GFC and Gibraltar Savings since 1975, and he was a member of the Joint Audit Committee of GFC and Gibraltar Savings. Mr. Flournoy was the Controller of the State of California from 1967 - 1974. Mr. Flournoy also served as a member of GFC's Special Corporate Policy Committee subsequently renamed the Special Litigation Committee.

17. Defendant Bernice Hutter ("Hutter") served as a member of the Board of Directors of GFC and Gibraltar savings from 1975 until 1988; and she served as a member of the Special Corporate Policy committee subsequently renamed the Special Litigation Committee.

18. Defendant Melvin P. Spitz ("Spitz") served as a member of the Board of Directors of GFC and Gibraltar savings since 1978, and he was a member of GFC and Gibraltar Savings' Joint Audit Committee. Mr. Spitz also served as a member of the Special Corporate Policy Committee subsequently renamed the Special Litigation Committee.

19. Defendant Rafael E. Vega ("Vega") served as a member of the Board of Directors of GFC and Gibraltar Savings since 1977, and he was a member of GFC and Gibraltar Savings' Joint Audit Committee.

20. Defendant Richard M. Post ("Post") served as Senior Vice President-Real Estate of Gibraltar Savings. Mr. Post also served as a director or officer of one or more of Gibraltar Savings' commercial real estate development subsidiaries and/or affiliates. Mr. Post joined Gibraltar Savings in 1985.

21. Defendant James R. Boyle ("Boyle") served as Executive Vice President-Real Estate Lending of Gibraltar Savings. Mr. Boyle also served as Vice President of Gibraltar Management of Properties, Inc. and American Funding Corporation. Mr. Boyle joined Gibraltar savings in 1985.

22. Defendant Warren P. Glupker ("Glupker") served as Chief Appraiser of Gibraltar Savings. Mr. Glupker was employed by Gibraltar Savings from 1966-1981 and from 1984-1989.

22A. Defendant Susan Rawlings ("Rawlings") is and was a certified public accountant who was employed by Gibraltar reporting or otherwise disclosing the revisions to such financial statements, the reasons for such changes and/or the effect of such changes; savings from September, 1985 through June 1987 as a senior financial analyst in charge of accounting for real estate investments.

23. Defendant Dean W. Harrison ("Harrison") served as a Senior Vice President, Genral Counsel and Secretary of Gibraltar Savings; and Secretary and General Counsel of GFC. Mr. Harrison also served as a director and officer of one or more of Girbraltar Savings' commmerical real estate development

subsidiaries and/or affiliates. Mr. Harrison joined Gibraltar in 1985.

24. Gibraltar Savings ("Gibraltar Savings") is a California corporation which is a wholly owned subsidiary of Gibraltar Financial Corporation, a Delaware corporation (herein "GFC"). GFC was organized in 1959 by Gibraltar Savings as a savings and loan holding company for Gibraltar Savings. GFC and Gibraltar Savings are herein collectively referred to simply as "Gibraltar" or the "company". As referred to herein "Gibraltar Savings" includes all of Gibraltar Savings' wholly owned subsidiaries and affiliates. As used herein "Gibraltar Savings" also includes the successor, transferee entity for Gibraltar Savings' assets caused to be created by the Resolution Trust Corporation as receiver for Gibraltar Savings as a federal association ("F.A.") believed to be known as Gibraltar Savings, F.A. GFC is presently in Chapter 11 reorganization proceedings under the protection of the Federal Bankruptcy Court; and accordingly, could not be named as a party defendant at the time this lawsuit was initiated without the permission of the Federal Bankruptcy Court (which permission is being sought).

25. Defendant Melvin Rifkind ("Rifkind") is a professional financial public relations consultant and advisor who provided shareholder relations and communication services to GFC and Gibraltar Savings during the period covered by this Complaint. Mr. Rifkind was a principal in the firm of Rifkind, Pondal & Parsons.

26. Rifkind Pondal & Parsons (the "Rifkind Firm") is a business entity (the nature of which is not presently known to the Plaintiffs but is believed to be a partnership or a corporation), which financial public relations firm provided professional shareholder relations and communications services to GFC and Gibraltar Savings during the period covered by this Complaint.

27. Defendant William H. Dudley ("Dudley") is or was a certified public accountant who was a partner with Ernst & Whinney during the period covered by this Complaint and who is

believed to have been primarily responsible for Ernst & Whinney's accounting, audit and other engagements with Gibraltar.

28. Ernst & Whinney ("Ernst") is a large, nationally recognized (so-called "Big Six") public accounting and auditing firm which provided accounting, auditing, tax and related services to GFC and Gibraltar Savings during the period covered by this Complaint. Ernst audited GFC and Gibraltar Savings consolidated financial statements for the year ended and as at December 31, 1985 as GFC and Gibraltar Savings' outside independent auditors, and issued their report and opinion thereon dated January 23, 1986 (herein "Gibraltar's 1985 Financial Statements"). Ernst republished their report and opinion on Gibraltar's 1985 Financial Statements in connection with Gibraltar Savings' offer, sale and issuance of $100,000,000 7-1/2% Convertible Subordinated Debentures due 2006 (referred to herein as the "Gibraltar 7-1/2's") and in connection with the offer, sale and issuance of GFC's $99,5000,000 13-7/8% Senior Subordinated Debentures due 2001 (referred to herein as "GFC's 13-7/8's") and in connection with the issuance of the two different versions of GFC and Gibraltar Savings audited consolidated financial statements for the year ended and as at December 31, 1986 published in GFC's 1986 Annual Report to Shareholders and the second ("bogus") version of such 1986 audited financial statements as published in GFC's Annual Report to the U. S. Securities and Exchange Commission (herein the "SEC") on Form 10-K for the year ended December 31, 1986 and in GFC's Proxy Statement dated April 6, 1987. Ernst continued to provide accounting, auditing and other related services to GFC and Gibraltar Savings throughout the year ended December 31, 1986 and-beyond. Ernst & Young is the successor firm to Ernst Whinney following the combination of Ernst & Whinney and Arthur Young & Co. in approximately 1987.

29. Alvin Kang ("Kang") is a certified public accountant who is a partner with Peat Marwick Mitchell & Co. and who was primarily responsible for Peat Marwick's accounting, audit and other engagements with Gibraltar during the period covered by this Complaint.

30. Peat Marwick Mitchell & Co. ("Peat") is a large, nationally recognized (so-called "Big Six") public accounting firm which provided accounting, auditing, tax and related services to GFC and Gibraltar Savings during the period covered by this Complaint. Peat audited GFC and Gibraltar Savings' consolidated financial statements for the year ended and as at December 31, 1986 and, in such capacity as GFC and Gibraltar's outside independent auditors, issued their reports and opinions, both dated January 21, 1987, on GFC and Gibraltar Savings' two different versions of 1986 audited consolidated financial statements as published in GFC's 1986 Annual Report To Shareholders, the second ("bogus") version of which was published in GFC's 1986 Annual Report to the SEC on Form 10-K for the year ended December 31, 1986 and GFC's Proxy Statement dated April 6, 1987. in issuing its report and opinion on Gibraltar's financial statements, Peat relied in part on audit work performed and opinions by Ernst and/or Kenneth Leventhal & Co. Peat also audited GFC and Gibraltar Savings' consolidated financial statements for the year ended December 31, 1987 and issued their report and opinion thereon dated January 29, 1988 (the "Gibraltar 1987 Financial Statements"), as published in GFC's Annual Report to Shareholders, in GFC's Annual Report to the SEC on Form 10-K for the year ended December 31, 1987, and in GFC's Proxy Statement dated April 8, 1988. Peat also audited GFC and Gibraltar Savings' consolidated financial statements for the year ended and as at December 31, 1988 and issued their report and opinion thereon dated March 14, 1989 (the "Gibraltar 1988 Financial Statements"), as published in GFC'S 1988 Annual Report to the SEC on Form l0-K for the year ended and as at December 31, 1988. Peat Marwick Main & Co. was the successor firm when Peat Marwick Mitchell & Co. and Main LaFrantz combined in approximately 1988. KPMG Peat Marwick is one of the largest accounting firms in the world and was the successor firm following the combination of KPMG and Peat Marwick Main & Co. in approximately 1988 (collectively referred to herein as "Peat").

31. Richard Sprayregen ("Sprayregen") is a certified public accountant and a partner with Kenneth Leventhal & Co.

and was primarily responsible for Kenneth Leventhal's accounting, auditing and other engagements with and for Gibraltar and Gibraltar Community Builders during the period covered by this Complaint.

32. Kenneth Leventhal & Co. ("Leventhal") is a large, nationally recognized accounting and auditing firm specializing in real estate and related services. Leventhal provided accounting, auditing, tax, management and business consulting and related services to GFC and Gibraltar Savings and to Gibraltar Community Builders, which was one of Gibraltar Savings' real estate development joint venture partnerships ("GCB"). Leventhal audited the financial statements of GCB for the years ended and as at October 31, 1983, 1984, 1985 and 1986, and issued their reports and opinions thereon. Leventhal, purporting to act as an outside independent auditor, audited a portion of GFC and Gibraltar Savings' consolidated financial statements for the years ended and as at December 31, 1985 and 1986 which audit work was relied upon by Ernst and Peat in their audit reports and opinions covering Gibraltar's 1985 and 1986 audited financial statements.

33. [Intentionally left blank].

34. Gibson Dunn & Crutcher ("Gibson Dunn") is a large, nationally recognized firm of lawyers. Gibson Dunn has acted as general counsel for Gibraltar for over twenty years and functioned as Gibraltar's "in-house" legal department or general counsel doing virtually all of Gibraltar's legal work. Gibson Dunn partner, William Stinehart, Jr. is the son of Gibraltar's long-time General counsel William Stinehart, Sr. who retired from Gibraltar in approximately 1985-1986 and was succeeded by Dean W. Harrison.

V.

CLASS ACTION-ALLEGATIONS

35. Plaintiffs seek to bring this action as a "Class Action" under Federal Rules of Civil Procedure Rule 23(b)(3). The Plaintiffs are informed and believe that the claims of the Plaintiffs are typical of the questions of law and fact common to all members of the class and which predominate over any questions affecting only individual class members; and that a Class Action is superior to other available methods for the fair and efficient adjudication of the controversy which is the subject of this lawsuit.

36. The definition of the proposed class or classes (the "Class") consists of:

(i) all persons who purchased or contracted to purchase and subsequently did purchase the debt or equity securities of GFC and/or Gibraltar Savings during the period commencing January 1, 1986 through April 30, 1989 (the "class Period"), and (ii) all persons who were shareholders of GFC and received GFC's Proxy Statements dated April 6, 1987 and/or April 8, 1988, who never served as an officer, director or employee of GFC or Gibraltar Savings (including any of its subsidiaries or affiliates) and who have not previously expressly and finally released, waived or otherwise relinquished their claims and legal rights against the defendants or any of them in respect of the specific claims made herein against such defendants and who have not previously initiated their own separate judicial action(s) covering the claims which are the subject of this Complaint and seeking monetary damages in respect thereof. As used herein for purposes of defining the Class, "persons" is intended to include individuals and entities (such as corporations, partnerships, trusts, etc.).

37. Included in the Class of persons whose claims are made the subject of this Complaint are all of the persons who during the Class Period purchased or otherwise owned shares of

the Common Stock of GFC; and all persons who purchased or otherwise owned debt securities of GFC and/or Gibraltar savings including without limitation the following securities: (i) GFC's 9-1/4's. (ii) GFC's 13-7/8's, and (iii) Gibraltar' 7-1/2's.

38. The proposed Class is believed to consist of approximately 5,OOO persons.

39. The proposed Class representatives' attorney is knowledgeable about the subject matter of the Complaint, having served as counsel of record in similar securities actions concerning GFC and Gibraltar Savings at least one of which actions is currently pending before this Court, and who is believed to be capable of adequately representing the Class in the instant lawsuit.

40. The claims which are the subject matter of the Complaint are believed to be common to the Class and involve principally the failure of GFC and Gibraltar Savings, and Gibraltar's management and professional advisors, to disclose certain material information which investors could reasonably have been expected to want to know in formulating investment decisions regarding the securities of GFC and Gibraltar Savings and which undisclosed information would have altered the total mix of available information to the owners and the public trading markets for such securities.

41. Members of the proposed Class purchased securities of GFC and/or Gibraltar Savings, without the benefit of material information which was omitted from GFC and Gibraltar Savings' securities offering and disclosure documents and other publicly disseminated statements, reports and information, and in reliance upon the integrity of the public trading markets for such securities (and the resulting trading prices for such securities in such public trading markets).

42. Based upon information currently available to the Plaintiffs, there is presently believed to be no action pending in respect of the matters which are the subject of the Complaint initiated by any members of the proposed Class the prior litigation

in respect of matters relating to the subject matter of the Complaint have all been consolidated (or were otherwise pending) before the U.S. District Court for the Central District of California, Judge Mariana R. Pfaelzer Presiding, which is believed to be the desirable venue for this action. Based upon the information available to the Plaintiffs all such prior litigation has been settled. The filing of the instant action was prompted in part by considerations relating to the statute of limitations applicable to one or more of the claims and theories of recovery stated herein. No difficulties in the management of the instant action as a Class Action are anticipated. The foregoing collectively substantiate the determination to prosecute this action and the claims stated herein as a Class Action for and on behalf of the prospective members of the Class in the United States District Court, Central District of California, wherein this action has been filed. FRCP-Rule 23 notice, in respect of this Class Action, is anticipated to be provided in writing delivered via the (First Class) U.S. Mail.

VI.

FRAUDULENT AND FALSE AND MISLEADING STATEMENTS

43. During the Class Period, GFC and/or Gibraltar Savings, under the direction and control of the management thereof, knowingly, intentionally, and/or recklessly, made fraudulent and materially false and misleading public statements regarding and affecting GFC and Gibraltar Savings; securities, including b ut not limited to the following:

(1) In GFC's 1985 Annual Report to Shareholders, GFC and Gibraltar Savings' Chairman of the Board and Chief Executive Officer, Herbert J. Young, reported and stated that,

"The outlook for Gibraltar in 1986 is favorable. . . . The Company will continue its planned asset growth, including primary emphasis on origination of adjustable rate residential mortgages which will be funded by liabilities with similar pricing

characteristics. . . Gibraltar looks forward to another successful performance in 1986."

(2) In GFC's 1985 Annual Report to the U.S. Securities and Exchange Commission (the "SEC") on Form 10-K, which included GFC and Gibraltar Savings' audited consolidated financial statements for the year ended and as at December 31, 1985, GFC and Gibraltar Savings stated that,

> " [Gibraltar's] real estate investments are carried at the lower of cost or net realizable value. Net realizable value is determined quarterly based on estimated sales value less estimated expenses and carrying costs through completion and sale of the project. Estimated sales values are based on independent appraisals or comparisons with sales prices of similar properties. Estimates of expenses and carrying costs are based on historical experience adjusted for factors such as anticipated inflation, cost of funds, etc."

(3) In approximately March of 1986, GFC and Gibraltar Savings issued audited consolidated financial statements for the year ended and as at December 31, 1985 (herein the "1985 Financial Statements") which Gibraltar thereby represented as being an accurate and complete presentation of the statements and the information set forth therein.

(4) Defendant Ernst issued its report and opinion dated January 23, 1986 on the 1985 Financial Statements stating that "the [GFC] financial statements referred to above present fairly the consolidated financial position of Gibraltar Financial Corporation and Subsidiaries at December 31, 1985 and 1984, and the consolidated results of their operations and changes in their consolidated financial position . . . in conformity with generally accepted accounting principles applied on a consistent basis."

(5) In April of 1986, Gibraltar Savings' Offering Circular ("Prospectus") dated April 7, 1986 covering the offer and sale of Gibraltar Savings' 7-1/2% Convertible Subordinated Debentures due 2006 (herein the "Gibraltar 7-1/2's"), and which included GFC and Gibraltar Savings' audited 1985 Financial Statements and therein described GFC's Common Stock underlying the convertible feature of the Gibraltar 7-1/2's and the public trading market price for such GFC Common Stock, stated at page 31 that:

> "[Gibraltar's] real estate investments are carried at the lower of cost or net realizable value. Net realizable value is determined quarterly based on estimated sales value less estimated expenses and carrying costs through completion and sale of the project. Estimated sales values are based on independent appraisals or comparisons with sales prices of similar properties. Estimates of expenses and carrying costs are based on historical experience adjusted for factors such as anticipated inflation, cost of funds, etc."

(6) In December of 1986, GFC's offering circular ("Prospectus") dated December 15, 1986 covering the offer and sale of GFC's $99,5OO,OOO 13-7/8% Senior Subordinated Debentures due 2001 (herein the "GFC 13-7/8's") included GFC and Gibraltar Savings' 1985 Financial Statements (which stated that "investments in real estate developments are carried at the lower of cost or net realizable value") and stated that "The Company's [GFC] Annual Report on Form l0-K for the year ended December 31, 1985 [and] Quarterly Reports on Form 10-Q for the quarters ended March 31, June 30 and September 30, 1986 . . . are incorporated in this Prospectus by reference and deemed a part hereof."

(7) In connection with the offer and sale of the GFC 13-7/8's, and the issuance of the Prospectus covering such securities offering, Ernst authorized and approved the inclusion and publication of its report and opinion dated January 23, 1986 covering GFC and Gibraltar Savings 1985 Financial

Statements which stated that "the [GFC] financial statements referred to above present fairly the consolidated financial position of Gibraltar Financial Corporation and Subsidiaries at December 31, 1985 and 1984, and the consolidated results of their operations and changes in their consolidated financial position . . . in conformity with generally accepted accounting principles applied on a consistent basis."

(8) In GFC and Gibraltar Savings' 1986 year-end earnings press release, GFC and Gibraltar Savings reported earnings. Earnings for the year ended December 31, 1986 and a "50% Dividend Increase" based upon such record earnings.

(9) In GFC's 1986 Annual Report to Shareholders, GFC and Gibraltar Savings' chairman of the Board and Chief Executive Officer, Herbert J. Young, reported and stated that:

> "OUTLOOK POSITIVE FOR 1987 The key fundamentals are in place for a successful year in 1987 . . .
>
> Gibraltar increased its reserves on commercial real estate loans and investments in real estate joint ventures made prior to 1985. Results for 1986 include provisions for loan losses of $34 million and losses on real estate operations of $33 million. As a result, there will be a substantial reduction in such provisions in 1987 and beyond and a positive effect on operating earnings." [emphasis added].

44. In March of 1987, GFC and Gibraltar savings issued audited consolidated financial statements for the year ended and as at December 31, 1986 which Gibraltar thereby represented as being an accurate and complete presentation of the statements and other information set forth therein (as at December 31, 1986 and for the year then ended).

45. Defendant Peat issued its report and opinion dated January 21, 1987 on the above-referenced financial statements stating that "the aforementioned [GFC] financial statements present fairly the financial position of Gibraltar Financial Corporation and Subsidiaries and the results of their operations and changes in their financial position for the year then ended in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year."

46. Defendant Ernst authorized and approved the inclusion and publication of its opinion and report covering Gibraltar's 1985 Financial Statements in GFC's 1986 Annual Report To Shareholders and to the SEC on Form 10-K.

47. Later in April of 1987, GFC and Gibraltar Savings issued a second ("bogus") version of their audited consolidated financial statements for the year ended and as at December 31, 1986 which Gibraltar thereby represented as being an accurate and complete presentation of the statements and the related information set forth therein (as at December 31, 1986 and for the year then ended) -- which later version of such 1986 audited financial statements were also covered by Peat's report and opinion dated January 21, 1987, but which were different in numerous material respects from Gibraltar's prior audited consolidated financial statements for the same period and as at the same date.

48. In April of 1987, GFC solicited proxies from the Company's shareholders to be used at the 1987 Annual Meeting of Shareholders to approve special retroactive indemnity and hold harmless agreements in favor GFC and Gibraltar Savings' management (insulating them from financial responsibility for mismanagement) pursuant to GFC's Proxy Statement dated April 6, 1987 which stated that, "the Board is not aware of [any claims] currently pending or threatened against any director or officer who might become party to the Indemnity Agreements". GFC and Gibraltar Savings' audited consolidated financial statements for the year ended December 31, 1986 in the form of the second ("bogus") version of such financial statements, and defendant

Peat's report and opinion dated January 21, 1987 covering such financial statements, were included in GFC's Proxy Statement dated April 6, 1987.

48A. At GFC's 1987 Annual Meeting of Shareholders, Herbert J. Young stated that the Company was in sound financial condition and the Company's future prospects were favorable.

49. GFC and Gibraltar Savings' Chairman of the Board and Chief Executive Officer, Herbert J. Young, reported and stated at the time Gibraltar announced in October of 1987 that Gibraltar had suffered previously unreported real estate related losses of approximately $243 million that, "Believe it or not, this Company is much stronger after doing this. This is not going to happen again". (L.A. Times Business Section article published on March 5, 1988, at page 10, reporting upon a prior statement by Mr. Young in late October or early November of 1987).

50. On or about November 11, 1987, GFC and Gibraltar Savings reported that Gibraltar planned to sell its Gibraltar MoneyCenter, consumer finance unit and would realize a net gain on the sale (however, on or about March 13, 1988, Gibraltar reported that it was closing its MoneyCenter operation resulting in a $20 million write-off).

51. In January of 1988, GFC and Gibraltar Savings issued a 1987 year-end results press release dated January 29, 1988 stating that "1988 should be a profitable year" for Gibraltar (however, in March 1989, Gibraltar confirmed that it had suffered four consecutive quarterly losses in 1988 totalling $101 million).

52. GFC and Gibraltar Savings' Chairman of the Board and Chief Executive Officer, Herbert J. Young, stated in his President's Letter dated January 29, 1988, included as part of GFC's 1987 Annual Report to Shareholders (at two different places one of which was highlighted in bold type face), that "Notwithstanding the loss in 1987, Gibraltar is in sound financial condition and the capital ratios of our savings and loan

subsidiaries remain in excess of regulatory requirements" (emphasis added).

53. At GFC's 1988 Annual Meeting of Shareholders held on May 20, 1988, GFC and Gibraltar Savings new President and Chief Executive Officer, James N. Thayer, reported and stated that,

> "[T]he Company's condition is now stabilized, and events of the past six months indicate that no additional major surprises should be expected."

54. In a Special June 1988 Edition of the Gibraltar Journal, sent to all GFC and Gibraltar Savings' securities holders, the above quoted statement was published and repeated.

55. Also in response to a question directed to Gibraltar's management during GFC's 1988 Annual Meeting of Shareholders regarding Gibraltar's financial situation, GFC and Gibraltar Savings' new Chairman of the Board, Jay Janis, stated in words or substance that, "the Company did not face any kind of a Government takeover crisis similar to the one previously experienced by Continental Illinois Bank because Gibraltar had the required regulatory net worth".

56. At the time of GFC's Annual Shareholders Meeting held in May of 1988 and thereafter, GFC and Gibraltar Savings, through Gibraltar's management, were issuing and otherwise publicly disseminating projections that Gibraltar would "break-even for the 3rd Quarter of 1988" and "report a profit for the 4th Quarter of 1988".

57. During the Class Period, and thereafter, Gibraltar's securities holders, and the public trading markets for such securities, were provided with repeated assurances that Gibraltar's management had done nothing wrong and that no basis existed for any action against Gibraltar's management or other representatives

in connection with the Company's large 3rd Quarter 1987 real estate related losses or otherwise.

58. Additionally, GFC and Gibraltar Savings made or caused to be made further statements, representations, reports and assurances in financial and other reports to securities holders, periodic reports, proxy statements and registration statements filed with the SEC, offering circulars and prospectuses, press releases and other materials and information which contained fraudulent and false and misleading statements regarding Gibraltar, its business, property, management, results of operations, financial condition, future prospects and related information which GFC and Gibraltar Savings knew at the time, or were reckless in not knowing, were not accurate and complete in all material respects and would affect investment determinations in respect of Gibraltar's publicly trade debt and equity securities.

59. GFC, Gibraltar Savings and Gibraltar's management became aware that one or more of the foregoing public statements was at the time it was made, or thereafter during the period of time that such defendants knew that Gibraltar's securities holders and the public trading markets for such securities were continuing, to rely upon such statements, materially false and misleading; and such defendants failed and refused to clarify or correct such false and misleading public statement(s)).

VII.

GIBRALTAR MANAGEMENT'S PARTICIPATION AND ASSISTANCE

60. GFC and Gibraltar savings acted under the direction and control of the persons (officers and directors) who-constituted and comprised the management of Gibraltar.

61. Gibraltar's management knowingly and intentionally, and/or recklessly, directly or indirectly caused GFC

and Gibraltar Savings to make the foregoing referenced fraudulent and false and misleading public statements and otherwise participated in the wrongful conduct alleged in this Complaint, including without limitation in the following instances ways and/or manner among others:

(1) Young, on or about January 21, 1987, stated that real estate related losses would decline with a corresponding increase in earnings;

(lA) Young on May 22, 1987, stated that Gibraltar was in sound financial condition and that the Company's prospects for the future were favorable;

(2) Young, on or about January 29, 1988, stated that Gibraltar was in sound financial condition;

(3) Young, an or about January 29, 1988, stated that 1988 should be a profitable year for Gibraltar;

(4) Thayer, in April and May of 1988, stated that Gibraltar would "break-even in the 3rd quarter of 1988 and would be "profitable for the 4th quarter of 1988";

(5) Thayer, on or about May 20, 1988, stated that Gibraltar's condition was stable and improving and no further surprises were expected;

(6) Janis, on or about May 20, 1988, stated that Gibraltar Savings did not face any potential crisis and/or takeover by the Government;

(7) Nussbaum regularly reviewed and approved GFC and Gibraltar Savings' press releases and announcements before they were disseminated including without limitation the GFC and Gibraltar Savings' press release dated January 21, 1987 which proclaimed that Gibraltar had achieved "Record Earning's" warranting a "50% Dividend Increase";

(8) Nussbaum was actively engaged in Gibraltar's efforts to sell the Galleria and then participated and assisted in the preparation of GFC and Gibraltar Savings' audited consolidated financial statements for the year ended and as at December 31, 1986 (the "bogus" version) which stated that the Galleria was being held as a long-term investment;

(9) Nussbaum personally instructed that Gibraltar's appraisal on the Galleria be cancelled, after learning in September of 1986 that such appraisal would reflect that Gibraltar's investment in the Galleria had been impaired by at least $30 million, knowing that Gibraltar had previously represented that real estate investments (and classified real estate loans) were valued regularly based on independent real estate appraisals;

(10) Williamson regularly reviewed and approved GFC and Gibraltar Savings' press releases before they went out including without limitation the GFC and Gibraltar Savings' press release dated January 21, 1987 which proclaimed that Gibraltar had achieved "Record Earnings" for 1986 warranting a "50% Dividend Increase";

(11) Williamson was partially responsible for the alteration and changing of Gibraltar management committee minutes and records reflecting that the Galleria was being held for sale subject to net realizable value computations prior to the time that GPC and Gibraltar Savings first wrongfully reported that the Galleria was not held for sale and was being held as a long-term investment;

(12) Blount regularly reviewed and approved GFC and Gibraltar Savings' press releases before they went out including Gibraltar's January 29, 1988 press release that 1988 should be a profitable year for Gibraltar;

(13) Blount was responsible for the dissemination of the June 1988 Special Edition of the Gibraltar Journal to all of GFC and Gibraltar Savings' securities holders;

(14) Blount communicated to security analysts and GFC and Gibraltar Savings' securities holders in 1988 that Gibraltar should be profitable for 1988, and later, that GFC and Gibraltar Savings would "break-even in the 3rd Quarter of 1988" and would "be profitable for the 4th Quarter of 1988";

(15) Mooney was responsible for the preparation of GFC and Gibraltar Savings' quarterly and annual financial statements distributed to GFC and Gibraltar Savings' securities holders and otherwise publicly disseminated representing that the contents thereof fairly and accurately reflected, among other things, the results of operations and financial condition of GFC and Gibraltar Savings as set forth therein, including without limitation GFC and Gibraltar Savings' two sets of different audited consolidated financial statements for the year ended and as at December 31, 1986;

(16) Crawford was responsible for the preparation of GFC and Gibraltar savings' quarterly and annual financial statements distributed to GFC and Gibraltar Savings' securities holders and otherwise publicly disseminated representing that the contents thereof fairly and accurately reflected, among other things, the results of operations and financial condition of GFC and Gibraltar savings as set forth therein, including without limitation GFC and Gibraltar Savings' two sets of different audited consolidated financial statements for the year ended and as at December 31, 1986;

(17) Crawford concurred in Gibraltar management's September 1986 decision to cancel the appraisal on the Galleria after learning that it showed Gibraltar's loss attributable to the Galleria to be in excess of $30 million;

(18) Messrs. Spitz Flournoy and Thayer constituted and comprised GFC and Gibraltar Savings' Joint Audit Committee which approved the form, content and issuance of GFC and Gibraltar Savings' two sets of different audited consolidated financial statements for the year ended and as at December 31, 1986;

(19) Messrs. Young, Thayer, Janis, Williamson, Sprague, Flournoy, Hutter, Spitz and Vega all constituted the GFC and Gibraltar Savings' Boards of Directors which approved and authorized the issuance of GFC and Gibraltar Savings' second ("bogus") version of audited consolidated 1986 financial statements which did not reflect or otherwise report to the readers thereof that such financial statements had been changed from a prior version thereof or otherwise reflect such changes or the reasons for and effect of such changes;

(20) Messrs. Young, Thayer, Janis, Williamson, Sprague, Flournoy, Hutter, Spitz and Vega constituting the GFC Board of Directors all approved and authorized the issuance of GFC's 1987 Proxy Statement dated April 6, 1987 which stated that such persons were not aware of the existence of any possible claims against any of GFC or Gibraltar Savings' officers or directors who were proposed to be granted special retroactive indemnity and hold harmless protection against financial responsibility for mismanagement by any such persons pursuant to action to be taken at such shareholders' meeting as proposed and recommended by such Board of Directors;

(21) Messrs. Thayer, Spitz, Flournoy, and Hutter constituted and comprised the "Special Corporate Policy Committee" subsequently renamed the so-called "Special Litigation Committee" of Gibraltar that falsely reported to Gibraltar's securities holders, and the public trading markets for such securities, that there was no evidence that defendant, Young and Gibraltar's other executives had done anything wrong relating to the substantial 3rd Quarter 1987 real estate related losses ($250,000,000) first reported by Gibraltar on or about October 30, 1987;

(22) Messrs. Boyle, Post, Glupker and Harrison were responsible for the reporting of the substantial real estate related losses by GFC and Gibraltar Savings on October 30, 1987 as all having taken place in the 3rd Quarter of 1987 (three

months ended September 30, 1987) as opposed to such losses having been actually incurred in one or more prior periods;

(23) Messrs. Boyle, Post and Harrison concurred in the decision and/or were aware that Gibraltar had cancelled an appraisal on the Galleria, and were otherwise aware that Gibraltar had suffered large real estate related losses substantially prior to the time such losses were first publicly reported by Gibraltar on October 30, 1987;

(24) Harrison participated and assisted in the preparation of GFC's 1987 Proxy Statement dated April 6, 1987 and the statement contained therein that no claims or threats of legal action existed against any of GFC or Gibraltar Savings' officers, directors or other employees who would be covered by the special retroactive indemnity and hold harmless agreements being proposed and recommended by GFC's Board of Directors for approval by GFC's shareholders;

(25) Defendants Young, Thayer, Janis, Williamson, Nussbaum, Mooney, Crawford, Blount, Sprague, Flournoy, Hutter, Spitz, Vega, Post, Boyle, Glupker and Harrison were primarily responsible for the preparation and issuance of GFC's 1985 Annual Report To Shareholders, GFC's 1985 Annual Report to the SEC on Form 10-K. Gibraltar Savings' Prospectus dated April 7, 1986, GFC's Prospectus dated December 15, 1986, the two different versions of GFC's 1986 Annual Report to Shareholders (including two different versions of Gibraltar's 1986 audited financial statements), GFC's 1986 Annual Report to the SEC On Form 10-K, GFC's Proxy Statement dated April 6, 1987, GFC's 1987 Annual Report To Shareholders, GFC's 1987 Annual Report to the SEC-On Form 10-K, GFC's Proxy Statement dated April 8, 1988, GFC and Gibraltar Savings' press releases dated January 23, 1986, January 21, 1987 and January 29, 1988, and the content thereof; and

(26) Defendant Rawlings was responsible for calculating and reporting for financial statement, Board reporting and other purposes the net realizable value of Gibraltar's

commercial real estate investments. Rawlings knew that such net realizable value calculations were not based on or otherwise determined by independent real estate appraisals or comparisons of value. Rawlings prepared monthly, quarterly and annual schedules and reports valuing Gibraltar's commercial real estate investments for financial reporting and other purposes which reports were published and otherwise publicly disseminated including without limitation in GFC's Annual Reports to Shareholders for the years ended December 31, 1985 and 1986, GFC's Annual Reports to the SEC on Form 10-K for the years ended December 31, 1985 and 1986 and Gibraltar Savings' Offering Circular dated April 7, 1986 covering the offering and sale of the Gibraltar 7-1/2's.

62. GFC and Gibraltar Savings Boards of Directors consisted and were comprised of the following individuals: Young, Thayer Janis, Williamson, Sprague, Flournoy, Hutter, Spitz and Vega (collectively and individually herein the "Gibraltar Board").

63. The Gibraltar Board was responsible for the management of GFC and Gibraltar savings.

64. The Gibraltar Board was responsible, under applicable California statutes pertaining to savings and loans and otherwise, to administer the affairs of and provide, sound and prudent management for Gibraltar.

65. The Gibraltar Board owed fiduciary duties to the shareholders of GFC to fairly and adequately represent and protect their interests in the business, management and affairs of Gibraltar for the benefit of such shareholder/owners.

66. The Gibraltar Board owed fiduciary or fiduciary like duties to the holders of GFC and Gibraltar Savings' convertible and other debt securities to fairly and adequately represent and protect the interests of such securities holders.

67. The Gibraltar Board selected and designated certain persons to serve as senior management executives to assist in the carrying out and performance of the Board's duties and

responsibilities for the management of Gibraltar and, as such, GFC and Gibraltar Savings' senior management also owed fiduciary duties to the Company's shareholder/owners, and other securities holders.

68. GFC and Gibraltar Savings' senior management included, among others, the following persons: Young, Thayer, Janis, Williamson, Nussbaum, Mooney, Crawford, Rawlings, Blount, Boyle, Post, Glupker, Harrison; and sometimes, Sprayregen.

69. The Gibraltar Board and the Gibraltar senior management (herein sometimes collectively referred to simply as "management") and Gibraltar's professional advisors including without limitation Ernst, Peat, Leventhal and Gibson Dunn, were responsible to ensure that Gibraltar complied with the registration requirements of the Securities Act of 1933, as amended (the "Securities Act"), and the registration and periodic reporting requirements imposed by law under the Securities Exchange Act of 1934, as amended (the "Exchange Act") for the benefit of the holders of Gibraltar's debt and equity securities and the public trading markets for such securities.

70. During the period covered by this Complaint, GFC's Common Stock was registered with the SEC under Section 12(b) of the Exchange Act and listed for trading and traded on the New York Stock Exchange ("NYSE") and the Pacific Stock Exchange ("PSE"); GFC's 9-1/4's were registered with the SEC under Section 12(b) of the Exchange Act and listed for trading and traded on the NYSE; and Gibraltar's 7-1/2's and GFC's 13-7/8's were traded on the U.S. over-the-counter market.

71. GFC and Gibraltar Savings were and are legally responsible for the wrongful actions of Gibraltar's Board and Gibraltar's officers, agents and other representatives undertaken and performed during the course of their duties and responsibilities for GFC and Gibraltar Savings.

VIII.

PERSONS WHO PARTICIPATED, ASSISTED, CONSPIRED WITH AND AIDED AND ABETTED GFC AND GIBRALTAR SAVINGS WRONGFUL AND ACTIONABLE CONDUCT

72. All of the persons identified above who served as officers, directors and/or senior management of GFC and/or Gibraltar Savings through such actions as described in Section VII herein and otherwise to be proved at trial of this case conspired with, participated, assisted and aided and abetted each other and GFC and Gibraltar Savings' wrongful and actionable conduct and activities as claimed in this Complaint.

73. Additionally, by their actions and conduct, the following persons and firms knowingly and intentionally participated, assisted, aided and abetted and conspired with GFC, Gibraltar Savings, Gibraltar's officers and directors and each other in the making, directly or indirectly, of fraudulent and false and misleading statements concerning Gibraltar and affecting the offer, sale, issuance, purchase and/or ownership of GFC and Gibraltar Savings' securities and public reporting in respect thereof, in the following particular instances, ways and/or manner among others:

(1) Peat Marwick. KPMG Peat Marwick and its predecessors (herein "Peat") audited and issued reports and opinions on and otherwise certified GFC and Gibraltar Savings' consolidated financial statements which they knew, or were reckless and/or negligent in not knowing, were not accurate and complete in all material respects and/or were not in accordance with GAAP (generally accepted accounting principles consistently applied) and/or the SEC's rules and regulations concerning the form and content of financial statements filed with the SEC (herein "Regulation S-X"), including without limitation Peat's reports and opinions dated January 21, 1987 and January 29, 1988 on GFC and Gibraltar Savings' audited consolidated financial statements for the years ended and as at, respectively, December 31, 1986 and 1987. Peat purposefully and/or negligently failed to

conduct an adequate audit and review of GFC and Gibraltar Savings' 1986 and 1987 financial statements and the matters stated therein for purposes of the issuance of Peat's report and opinion covering such financial statements. For example, Peat never audited Gibraltar Savings' investment in Gibraltar community Builders and, therefore, failed to discover that Gibraltar had incurred a substantial loss in respect of its investment in GCB. Likewise, Peat never audited Gibraltar Savings' investment in respect of the Galleria and, therefore, failed to-discover that Gibraltar's investment therein had been impaired by at least $30 million by the end of 1986. Gibraltar's 1985 Annual Report to the SEC on Form 10-K, Gibraltar Savings' Prospectus dated April 7, 1986, GFC's Prospectus dated December 15, 1986 and GFC's 1986 Annual Report to the SEC on Form 10-K which contained Peat's audit report and opinion all reported and otherwise stated that Gibraltar's commercial real estate investments were regularly valued at the lower of cost or net realizable value based upon independent real estate appraisals or comparisons of value. Following the issuance of Peat's reports and opinions on Gibraltar's 1986 and 1987 financial statements and knowing that readers of Gibraltar's audited 1986 Financial Statements would continue to use such financial statements in formulating investment decisions regarding Gibraltar's securities, management performance and otherwise Peat became aware and otherwise knew that such financial statements were not accurate and complete in all material respects and Peat failed and refused to cause Gibraltar to revise or otherwise modify such financial statements or to revise or reissue Peat's reports and opinions on such false and misleading financial statements in violation of Statement On Auditing Standards (SAS) No. 1 as promulgated by the American Institute of Certified Public Accountants ("AICPA"). Peat and the accountants comprising and representing such accounting firm participated in the preparation of and assisted GFC, Gibraltar Savings and Gibraltar's management and attorneys to prepare, make and disseminate reports, financial statements, registration statements, offering circulars, prospectuses, proxy statements, press releases and other communications to GFC and Gibraltar Savings' securities holders and to the public trading markets for such securities which Peat knew, or was reckless

and/or negligent in not knowing, were not accurate and complete in all material respects and/or were not in accordance with GAAP, SEC Regulation S-X and/or SEC Regulation S-K, including without limitation GFC's 1986 Annual Report to the SEC on Form 10-K, GFC's 1986 Annual Report To Shareholders and GFC's Proxy Statement dated April 6, 1987. Peat is responsible for the wrongful and actionable activities of its representatives including defendant Kang. Peat and Kang were aware that GFC and Gibraltar Savings' 1986 audited consolidated financial statements as filed with the SEC in March of 1987 were not accurate and complete in all material respects, and Peat and Kang participated, assisted and aided and abetted Gibraltar to change such audited financial statements to cover up and conceal such deficiencies, including without limitation the preparation and back-dating of documents to be signed by Gibraltar's management concerning the Galleria project and the classification of such real estate development asset as being held as a "long-term" investment. Peat, through one or more of such firm's accountants including Kang, conspired and agreed with GFC, Gibraltar Savings and Gibraltar's management and attorneys to cover up and conceal the incompetence and wrongful and actionable conduct and activities of Gibraltar's management, and thereby breached obligations to the shareholders of GFC and Gibraltar's other securities holders whose interests they were duly bound and obligated to protect. As a result of Peat's service as GFC and Gibraltar Savings' independent outside certified public accountants and auditors, and the relationship and superior knowledge gained by Peat as a result of such position and services and Gibraltar's securities holders' dependence and reliance thereon, Peat and its accountants owed fiduciary duties to Gibraltar's securities holders.

(2) Ernst & Young. Ernst & Young and its predecessor ("Ernst") audited and issued reports and opinions on and otherwise certified GFC and Gibraltar Savings' consolidated financial statements which they knew, or were reckless and/or negligent in not knowing, were not accurate and complete in all material respects and/or were not in accordance with GAAP and/or Regulations S-X and S-K, including without limitation GFC and Gibraltar Savings' audited consolidated financial

statements for the year ended and as at December 31, 1985. Further, Ernst participated in the audit of Gibraltar's financial statements and reports for the year ended and as at December 31, 1986. Ernst purposefully and/or negligently failed to conduct an adequate audit and review of GFC and Gibraltar Savings' 1985 and 1986 financial statements and the matters stated therein for purposes of issuing, and consenting to the republication of Ernst's report and opinion on Gibraltar's 1985 Financial Statements and the issuance of the report and opinion on Gibraltar's 1986 financial statements. Following the issuance of Ernst's report and opinion on Gibraltar's 1985 Financial Statements, and Ernst's work in respect of Gibraltar's 1986 financial statements, Ernst became aware and otherwise knew that such financial statements were not accurate and complete in all material, respects and Ernst failed and refused to cause Gibraltar to revise or otherwise modify such financial statements or to revise or reissue Ernst's report and opinion, or to cause Peat to revise or reissue Peat's report and opinion, on such false and misleading financial statements. For example, Ernst never audited Gibraltar Savings' investment in Gibraltar Community Builders and, therefore, failed to discover that Gibraltar had incurred a substantial loss in respect of its investment in GCB. Ernst and Dudley were aware by at least April of 1986 that Gibraltar's net income for the twelve months negligent in not knowing, were. not accurate and complete in all material respects and/or were not in accordance with GAAP and/or Regulations S-X and S-K, including without limitation GFC and Gibraltar Savings' audited consolidated financial statements for the year ended and as at December 31, 1985. Further, Ernst participated in the audit of Gibraltar's financial statements and reports for the year ended and as at December 31, 1986. Ernst purposefully and/or negligently failed to conduct an adequate audit and review of GFC and Gibraltar Savings' 1985 and 1986 financial statements and the matters stated therein for purposes of issuing, and consenting to the republication of Ernst's report and opinion on Gibraltar's 1985 Financial Statements and the issuance of the report and opinion on Gibraltar's 1986 financial statements. Following the issuance of Ernst's report and opinion on Gibraltar's 1985 Financial Statements, and Ernst's work in respect of Gibraltar's 1986 financial statements, Ernst

became aware and otherwise knew that such financial statements were not accurate and complete in all material, respects and Ernst failed and refused to cause Gibraltar to revise or otherwise modify such financial statements or to revise or reissue Ernst's report and opinion, or to cause Peat to revise or reissue Peat's report and opinion, on such false and misleading financial statements. For example, Ernst never audited Gibraltar Savings' investment in Gibraltar Community Builders and, therefore, failed to discover that Gibraltar had incurred a substantial loss in respect of its investment in GCB. Ernst and Dudley were aware by at least April of 1986 that Gibraltar's net income for the twelve months ended December 31, 1985 was substantially overstated by at least $4 million attributable to losses resulting from Gibraltar's commercial real estate loans and investments (including Gibraltar loans and/or investments in its so-called (Desert properties) as reflected in the minutes of Gibraltar's Audit Committee Meeting held April 22, 1986, and that GFC and Gibraltar Savings, 1985 Financial Statements were not otherwise accurate and complete in all material respects and that Gibraltar had incurred substantial unreported losses attributable to its commercial real estate loan and investment activities. In spite of such information discovered subsequent to its previously issued auditors' report, and knowing that readers of Gibraltar's audited consolidated financial statements for the year ended and as at December 31, 1985 would continue to use such financial statements in formulating decisions regarding Gibraltar's securities, management performance and otherwise, Ernst failed and refused to cause Gibraltar to revise or otherwise modify such financial statements or to revise or reissue Ernst's report and opinion on such false and misleading financial statements in violation of Statement On Auditing Standards (SAS) No. 1 as promulgated by the AICPA. Additionally by way of example, Ernst failed to discover that Gibraltar Savings was failing to properly accrue and expense interest on zero coupon bonds or other debt instruments sold and issued by Gibraltar resulting in a material understatement of expenses and a material overstatement of income by Gibraltar for 1985. Gibraltar's 1985 Annual Report to the SEC on Form 10-K for the year ended December 31, 1995, which was incorporated by reference in Gibraltar Savings'. Prospectus dated April 7, 1986 and GFC's

Prospectus dated December 15, 1986, contained the following false and misleading statements, representations, information and assurances: "[Gibraltar's] real estate investments are carried at the lower of cost or net realizable value. Net realizable value is determined quarterly based on estimated expenses and carrying costs through completion and sale of the project. Estimated sales values are based on independent appraisals or comparisons with sales prices of similar properties." Ernst rendered its opinion on GFC and Gibraltar Savings' consolidated financial statements for the year ended and as at December 31, 1985 knowing, or having been reckless and/or negligent in not knowing, that Gibraltars' real estate investments were not valued at the lower of cost or net realizable value based upon independent appraisals or comparisons with sales prices of similar properties. Utilizing financial statements audited and certified by Ernst (which did not report or otherwise disclose the existence of any anticipated future losses attributable to Gibraltar's commercial real estate loans or investments), Gibraltar sold and issued $199,500,000 in new convertible debt securities to public investors during 1986. Less than two quarters (six months) after the conclusion of the last of such securities offerings, Gibraltar reported the existence of real estate related losses of no less than a quarter of a billion dollars. Ernst and the accountants comprising and representing such accounting firm participated in the preparation of and assisted GFC, Gibraltar Savings and Gibraltar's management to prepare, make and disseminate reports, financial statements, registration statements, offering circulars, prospectuses, proxy statements, press releases and other communications to GFC and Gibraltar Savings' securities holders and to the public trading markets for such securities which Ernst knew, or was reckless and/or negligent in not knowing, were not accurate and complete in all material respects and/or were not in accordance with GAAP and/or SEC Regulations S-X and S-K, including without limitation GFC's 1985 Annual Report To Shareholders, GFC's 1985 Annual Report to the SEC on Form 10-K, Gibraltar Savings' Prospectus dated April 7, 1986, GFC's Prospectus dated December 15, 1986 and GFC's 1986 Annual Report to the SEC on Form 10-K. Ernst is responsible for the wrongful and actionable activities of its representatives including defendant Dudley. Ernst, through one or

more of such firm's accountants including Dudley, conspired and agreed with GFC, Gibraltar Savings and Gibraltar's management and attorneys to cover up and conceal the incompetence and wrongful and actionable activities of Gibraltar's management, and thereby breached obligations to the shareholders of GFC and Gibraltar's other securities holders whose interests they were duly bound and obligated to protect. As a result of Ernst's service as GFC and Gibraltar Savings' independent outside certified public accountants and auditors, and the relationship and superior knowledge Ernst gained as a result of such position and services and Gibraltar's securities holders' dependence and reliance thereon, Ernst and its accountants owed fiduciary duties to Gibraltar's securities holders.

(3) Kenneth Leventhal & Co. Kenneth Leventhal & Co. ("Leventhal") audited portions of GFC and Gibraltar Savings' consolidated financial statements and participated and assisted in the issuance of reports and opinions on such financial statements which they knew, or were reckless and/or negligent in not knowing, were not accurate and complete in all material respects and/or were not in accordance with GAAP and/or Regulations S-X and S-K, including without limitation GFC and Gibraltar Savings' audited consolidated financial statements for the years ended and as at December 31, 1985 and 1986. Leventhal audited and issued reports and opinions on and otherwise certified the financial statements of one or more of Gibraltar's real estate development joint venture partnerships (including without limitation Gibraltar community Builders, a California general partnership [referred to herein as "GCB"] for the years ended and as at October 31, 1985 and 1986) which Leventhal reports and opinions were intended to be and were used for purposes of the preparation and issuance of Gibraltar's financial statements and auditor's reports and opinions thereon. Leventhal purposefully and negligently failed to conduct an adequate review of Gibraltar and GCB's financial statements and the matters stated therein for the purposes of the issuance of Leventhal's report and opinion on GCB's financial statements as referenced above and the audit, report and opinion on Gibraltar's financial statements as referenced above. Leventhal and

Sprayregen *failed to disclose, and covered-up and concealed, the* fact that as a result of their relationship and services to Gibraltar (and to GCB) that Leventhal was precluded from acting as an "independent accounting and auditing firm for Gibraltar (and for GCB). For example, Leventhal never required GCB to obtain any independent real estate appraisals on GCB's real estate development properties or otherwise to establish the net realizable value of such properties for financial reporting purposes. Leventhal, knowing that the Galleria was for sale and having assisted Gibraltar in efforts to sell the Galleria, subsequently instructed and otherwise caused Gibraltar to alter corporate minutes and records accurately reflecting that the Galleria was held for sale subject to net realizable value computations so that such records would reflect that the Galleria was not for sale. Following the issuance of Leventhal's reports and opinions on GCB's 1985 and 1986 financial statements, and the assistance rendered by Leventhal in the audit of Gibraltar leading to the issuance of GFC and Gibraltar Saving's 1985 and 1986 audited financial statements and reports and opinions thereon by Ernst and Peat and knowing that readers of such financial statements would continue to use such financial statements in formulating investment decisions regarding Gibraltar's securities, management performance and otherwise, Leventhal became aware and otherwise knew that such financial statements were not accurate and complete in all material respects and Leventhal failed and refused to cause GCB and/or Gibraltar to revise or otherwise modify such financial statements or to revise or reissue Leventhal's reports and opinions on such false and misleading financial statements in violation of Statement on Auditing Standards (SAS) No. 1 as promulgated by the AICPA. Leventhal and the accountants comprising and representing such accounting firm participated in the preparation of and assisted GFC, Gibraltar Savings and Gibraltar's management, other accountants and attorneys to prepare, make and disseminate reports, financial statements, registration statements, offering circulars, prospectuses, proxy statements, and/or press releases and other communications to GFC and Gibraltar Savings' securities holders and to the public market for such securities which Leventhal knew, or was reckless and/or negligent in not knowing, were not accurate and complete

in all material respects and/or were not in accordance with GAAP and/or Regulations S-X and S-K, including without limitation GFC's 1985 and 1986 Annual Reports To Shareholders and 1985 and 1986 Annual Reports to the SEC on Form 10-K. Leventhal is responsible for the wrongful and actionable conduct of its representatives including defendant Sprayregen. Leventhal and Sprayregen were aware that GFC and Gibraltar Savings 1986 audited consolidated financial statements as filed with the SEC in March of 1987 were not accurate and complete in all material respects, and Leventhal and Sprayregen conspired with and participated, assisted and aided and abetted Gibraltar and Gibraltar's management, other accountants and attorneys to change such audited financial statements to cover up and conceal such deficiencies, including without limitation the alteration of Gibraltar management committee minutes and records reflecting that the Galleria was held for sale subject to net realizable value computations and by the issuance of a representation letter dated March 6, 1987 pertaining to the Galleria which Leventhal and Sprayregen knew contained fraudulent and false and misleading statements as to, among other things, the existence of projections and forecasts for the Galleria (which had previously been prepared by Leventhal and Sprayregen for Gibraltar); and Leventhal and Sprayregen thereby breached obligations to the shareholders of GFC and Gibraltar's other securities holders whose interests and rights such accountants were duty bound and obligated to protect. As a result of Leventhal's service as GCB and GFC and Gibraltar Savings' independent outside certified public accountants and auditors, and the relationship and superior knowledge Leventhal gained as a result of such position and services and Gibraltar's securities holders' dependence and reliance thereon, Leventhal and its accountants owed fiduciary duties to Gibraltar's securities holders.

(4) Gibson, Dunn & Crutcher. Gibson, Dunn & Crutcher and the attorneys comprising and representing such law firm (herein "Gibson Dunn") authored, prepared and disseminated, and participated in the preparation of and assisted GFC and Gibraltar Savings including its officers, directors, accountants and others to prepare, make and disseminate reports,

press releases, financial statements, registration statements, prospectuses, offering circulars, proxy statements and other communications to GFC and Gibraltar Savings' securities holders, their representatives and the public market for Gibraltar's securities which contained or otherwise included or involved representations, statements and/or assurances that Gibson Dunn knew, or was extremely reckless and/or negligent in not knowing, were not accurate and complete in all material respects and did not comply with applicable requirements of the SEC and other applicable Government regulatory agencies. Instead of fulfilling such firm's duties and obligations to Gibraltar and its shareholders, Gibson Dunn abandoned such professional and other duties and obligations and failed to take action and took action which Gibson Dunn knew or should have known was adverse to and not in the best interests of Gibraltar and its shareholders and was also contrary to Gibson Dunn's duties and obligations to investors and the public trading market for Gibraltar's securities and otherwise in respect of Gibraltar's status as a public financial institution. Gibson Dunn's wrongful and actionable conduct as complained of herein included the following:

A. 1987 Joint Proxy Statement/Prospectus.

1. Prior to GFC's 1987 Annual Meeting and the voting of proxies obtained as a result of GFC's Joint Proxy Statement/Prospectus dated April 6, 1987 as mailed under Notice of Annual Meeting dated April 13, 1987 to all of GFC's stockholders and otherwise publicly disseminated on or about April 15, 1987 (herein the "GFC 1987 Proxy Statement"), Gibson Dunn was aware that one or more shareholders of GFC were threatening shareholder mismanagement lawsuits against GFC's officers and directors.

2. Prior to GFC's 1987 Annual Meeting and the voting of proxies obtained as a result of GFC's 1987 Proxy Statement, Gibson Dunn was aware that an investigation was underway into claims by one or more of GFC's shareholders and one or more of Gibraltar's joint venture partners involving mismanagement, misfeasance and malfeasance by GFC

and Gibraltar Savings' officers and directors relating to the Galleria and otherwise in respect of Gibraltar managements wrongful conduct in terminating the existing management contract and thereafter taking over management of Gibraltar's GCB and Gallaria projects as part of Gibraltar's efforts to cover up and conceal wrongful and actionable conduct in respect of such real estate investments by Gibraltar's management.

3. Prior to GFC's 1987 Annual Meeting and the voting of proxies obtained as a result of GFC's 1987 Proxy Statement, Gibson Dunn was aware of facts constituting and giving rise to claims and causes of action for mismanagement, breach of fiduciary and statutory duty and fraud and securities fraud by Gibraltar's officers and directors.

4. Prior to GFC's 1987 Annual Meeting and the voting of proxies obtained as a result of GFC's 1987 Proxy Statement, Gibson Dunn was aware that one of GFC's shareholders had actually initiated litigation alleging, among other things, that GFC and Gibraltar Savings' officers and directors were covering up and concealing from GFC's securities holders substantial losses attributable to Gibraltar's investment in the Galleria and other real estate development projects in violation of such persons' fiduciary and other duties and ooligations to GFC's stockholders and in violation of applicable federal securities laws.

5. Prior to GFC's 1987 Annual Meeting and the voting of proxies obtained as a result of GFC's 1987 Proxy Statement, Gibson Dunn was aware that one or more of GFC's shareholders had notified GFC and Gibson Dunn that the statement contained in GFC's 1987 Proxy Statement that GFC'S Board of Directors was not aware of any claims pending or threatened that would be covered by the special retroactive indemnity and hold harmless agreements in favor of the Board and Gibraltar's other officers/directors was false and misleading.

6. Prior to the preparation and dissemination of GFC's 1987 Proxy Statement, Gibson Dunn was aware that Gibraltar's securities disclosure documents stating that

all of Gibraltar's real estate investments were valued quarterly for financial reporting purposes at the lower of cost or net realizable value based upon independent appraisals or comparisons of value were not correct and that Gibraltar had not obtained appraisals or comparisons of value on a substantial majority of Gibraltar's real estate investments including the Galleria.

7. Prior to the preparation and dissemination of GFC's 1987 Proxy Statement, Gibson Dunn was aware that GFC and its management had prepared and disseminated two different sets of 1986 audited financial statements.

8. Prior to the preparation and dissemination of GFC's 1987 Proxy Statement, Gibson Dunn was aware that GFC's Proxy Statement referenced GFC's 1986 Annual Report To Shareholders (including Gibraltar's 1986 audited consolidated financial statements included therein) accompanying such Proxy Statement as "The 1986 Annual Report of GFC" but did not disclose the existence of a prior version of GFC's 1986 Annual Report To Shareholders (including Gibraltar's 1986 audited consolidated financial statements) which had been furnished to the SEC for purposes of such Agency's review and "clearance" of GFC's Proxy Statement.

9. Prior to GFC's 1987 Annual meeting and the voting of proxies obtained as a result of GFC's 1987 Proxy Statement, Gibson Dunn was aware that one or more shareholders of GFC were claiming that such Proxy Statement was false and misleading for failing to accurately report total compensation paid to officers and directors of GFC and its affiliates as required under applicable SEC proxy disclosure rules and regulations.

10. Prior to GFC's 1987 Annual Meeting and the voting of proxies obtained as a result of GFC's 1987 Proxy Statement, Gibson Dunn knew that the Proxy Statement was not accurate and complete in all material respects

and otherwise in compliance with all applicable SEC proxy disclosure rules and regulations.

11. However, prior to GFC's 1987 Annual Meeting and the voting of proxies obtained as a result of GFC's 1987 Proxy Statement, Gibraltar through Robert T. Gelber ("Gelber"), advised GFC's Board of Directors not to revise, update or otherwise amend GFC's 1987 Proxy Statement.

12. At GFC's 1987 Annual Meeting held on May 22, 1987, Gibson Dunn, through Gelber, addressed the Meeting and represented that GFC's 1987 Proxy Statement was accurate and complete.

13. Prior to the preparation and dissemination of GFC's 1987 Proxy Statement, Gibson Dunn attorney Martin C. Washton ("Washton") told defendant Harrison at Gibraltar that it was defendant Nussbaum at Gibraltar who was the one who had actually ordered the Marshall & Stevens appraisal on the Galleria cancelled upon learning in September of 1986 that the appraisal reflected a loss attributable to Gibraltar's investment in such property of approximately $30 million.

14. On or about February 27, 1987, Roderick G. Dorman from the law firm of Dorman & Wheeler representing Gibraltar Community Builders, Inc. ("GCBI"), met with Gibraltar's senior management and informed them that GCBI believed that Gibraltar was manipulating Gibraltar community Builders (herein "GCB") to hide and conceal losses associated with the Gallaria from Gibraltar's securities holders and Government regulatory agencies, including the transfer of the Galleria into and then out of GCB immediately prior to and after December 31, 1986.

15. At the meeting with Gibraltar's management, Dorman delivered a copy of a letter on his law firm's stationery dated February 6, 1987 (the "Dorman & Wheeler Letter") which stated among other things that, "... Gibraltar Financial Corporation through its senior executives and directors

has sought to manipulate its financial statement concerning substantial losses associated with the New Orleans Galleria and other assets through the use of the Partnership's financial statement".

16. Gibraltar's management reported the contents of the GCBI/Gibraltar meeting to Gibson Dunn shortly after it took place.

17. On or about March 9, 1987, Harrison provided Gibson Dunn (Washton) with a copy of the Dorman & Wheeler Letter.

18. On or about March 2, 1987, Harrison provided the FHLBB with a copy of the Dorman & Wheeler Letter under his transmittal letter addressed to Dirk Adams, Esq. stating that, "I enclose herewith a letter from the law firm of Dorman and Wheeler outlining serious allegations that have been made against us by one of the Partners of our Partnership, Gibraltar Community Builders ... they are alleging that Gibraltar officers failed to apprise the Federal Home Loan Bank Board and other institutions of the financial situation at the Metairie."

19. On or about March 9, 1987, Harrison provided Gibson Dunn (Washton) with a copy of his letter to Dirk Adams at the FHLBB.

20. On or about March 9, 1987, Gibson Dunn (Gelber, Washton and Madeleine Kleiner) reviewed a copy of GFC's 1986 Annual Report to the SEC on Form 10-K stating that Gibraltar's real estate investments were valued at the lower of cost or net realizable value based upon independent real estate appraisals and comparisons of value.

21. Gibson Dunn (Gelber and Kleiner) had originally authored and caused such representation, that Gibraltar's commercial real estate investments were valued based upon independent real estate appraisals and comparisons of value,

to be included in GFC's 1985 Annual Report to the SEC on Form 10-K.

22. On or about March 3, 1987, Gibson Dunn (Gelber and Klainer) was aware that GFC had submitted its 1986 Annual Report To Shareholders (including audited consolidated financial statements for the year ended and as at December 31, 1986 reflecting that Gibraltar did not own the Galleria at December 31, 1986) to the SEC for purposes of obtaining "clearance" of GFC's 1987 Proxy Statement.

23. On or about March 13, 1987 GCBI filed an action in Superior Court in Stockton, California against Gibraltar and Doe Defendants 1-20 (the "GCBI Litigation") alleging that Gibraltar's management had wrongfully transferred the Galleria first into and then out of GCB and thereafter wrongfully terminated GCBI as the managing partner of such GCB Partnership in violation of GCBI's written management agreement with GCB and Gibraltar.

24. Gibson Dunn (Washton) acknowledged in writing by letters dated March 17 and April 20, 1987 to one or more of Gibraltar's shareholders the existence of claims against Gibraltar's management including that such management had wrongfully failed to disclose substantial losses attributable to Gibraltar's real estate activities.

25. Gibson Dunn (Washton) was present on April 10, 1987 when defendant Young testified during the course of his deposition in the GCBI Litigation that there were no appraisals on the Gallaria.

26. On or about April 20, 1987, Gibson Dunn (Kleiner) received a copy of a letter from Lynne Crawford at Gibraltar to the SEC (Public Reference Room) stating that GFC's 1986 Annual Report To Shareholders had been revised and transmitting copies of such revised GFC 1986 Annual Report for filing with the SEC.

27. Prior to the holding of the 1987 Annual Meeting, Gibson Dunn (Washgton) by letter dated April 20, 1987 threatened one ore more of GFC's shareholders with criminal prosecution of such shareholders) published any claim that Gibraltar's management was concealing substantial unreported losses attributable to Gibraltar's commercial real estate activities thereby rendering Gibraltar's published financial statements false or misleading.

28. In February and March of 1987, Gibson Dunn (Gelber and Kleiner) prepared a draft of the nonfinancial portions of GFC's 1987 Proxy Statement including the sections of the Proxy Statements captioned "Proposed Amendment of Restated Certificate of Incorporation to Eliminate Certain Director Liability to the Extent Permitted by Delaware Law" and "Proposal to Approve a Resolution Authorizing Indemnity Agreements Between GFC and Directors and Officers" wherein it was stated, among other things, that there were no claims pending or threatened against Gibraltar's management which would be covered by the proposed amendment to GFC's Articles of Incorporation or by the special retroactive indemnity agreements being proposed and recommended by GFC's Board of Directors for approval and authorization by GFC's shareholders.

29. On or about April 15, 1987, Gibson Dunn (Gelber Kleiner) approved the form of GFC's 1987 Proxy Statement dated April 6, 1987, including the reference to Gibson Dunn contained therein, to be mailed to all of GFC's shareholders.

30. At that time, Gibson Dunn know that the form of GFC's 1986 Annual Report To Shareholders (including GFC's consolidated audited 1986 financial statements which reflected that Gibraltar owned the Galleria at December 31, 1986) which was to accompany such Proxy Statement to all of GFC shareholders, and was referred to in such Proxy Statement as being "the 1986 Annual Report of GFC" was not the same Annual Report which had been previously submitted to the SEC for purposes of clearing GFC's 1987 Proxy Statement and that the

audited financial statements included therein had been changed and revised from the previously issued version of such financial statements without notifying the readers of such Annual Report or financial statements that they had been revised or the reasons for such revisions or the effect thereof.

31. Preceding the mailing of GFC's 1987 Proxy Statement, Gibson Dunn (Gelber and Kleiner) had reviewed and approved for issuance Gibraltar's 1986 year-end press release reporting "Record Earnings" and a 50% increase in dividends and reporting consolidated assets at December 31, 1986 to be $12,173,649,000 which was different than the total assets at December 31, 1986 as reported by the Annual Report being mailed to GFC's shareholders along with GFC's 1987 Proxy Statement.

32. Prior to the preparation and dissemination of GFC's 1987 Proxy Statement Gibson Dunn (Gelber) had been negotiating on behalf of Gibraltar with the FHLBB to obtain approval of Gibraltar's application to acquire Santa Clara Savings ("Santa Clara").

33. As a result of such negotiations, Gibson Dunn knew that the FHLBB was going to condition approval of Gibraltar's application to acquire Santa Clara on Gibraltar entering into an agreement with the FHLBB whereby GFC would agree to maintain the minimum regulatory capital required for Gibraltar Savings and all of GFC's other savings & loan subsidiaries (Gibraltar Savings of Washington, etc.) (the "Capital Maintenance Agreement"), and GFC would also agree and promise not to cause Gibraltar Savings (or any of its other savings & loan subsidiaries) to declare and pay any cash dividends to GFC in excess of 50% of such subsidiary's net income for the year in which any such dividend was to be paid.

34. Gibson Dunn knew that such capital maintenance and dividend restriction agreements were intended to apply to GFC's acquisition of First Savings Bank of

Florida as proposed and recommended by the GFC Board of Directors in GFC's 1987 Proxy Statement.

35. In drafting GFC's 1987 Proxy Statement, Gibson Dunn included the statement contained therein that, "... a significant source of GFC's income consists of dividends from Gibraltar Savings and Gibraltar Washington."

36. Prior to GFC's 1987 Annual Meeting and the voting of proxies obtained as a result of GFC's 1987 Proxy Statement Gibson Dunn (Gelber) received a copy of the FHLBB's March 1987 letter to Gibraltar Savings confirming that the capital maintenance agreement would have to be implemented before the FHLBB would approve Gibraltar's acquisition of Santa Clara Savings.

37. Prior to GFC's 1987 Annual Meeting and the voting of proxies obtained as a result of GFC's 1987 Proxy Statement, Gibson Dunn learned that the FHLBB was not going to allow Gibraltar Savings to provide GFC with sufficient cash to purchase First Savings Bank of Florida (unless and until GFC agreed to sell Gibraltar Savings $35 million of the preferred stock of Gibraltar Savings of Washington in consideration for the use of Gibraltar Savings' cash to be used to consummate GFC's proposed cash for stock transaction of First Savings Bank of Florida as proposed and recommended in GFC's 1987 Proxy Statement).

38. In drafting GFC's 1987 Proxy Statement, Gibson Dunn had not included any disclosure regarding GFC's inability to finance a cash acquisition of First Savings Bank of Florida or the existence or consequences of any objections raised by the FHLBB in respect of the use of funds from Gibraltar Savings to finance such proposed acquisition.

39. On or about May 14, 1987, a shareholder of GFC filed an action in Federal Court in Los Angeles (Case No. 87 03147) captioned Stahl v. GFC alleging,

inter alia, claims of management malfeasance and misfeasance involving, among other things, the Galleria.

40. GFC's Proxy Statement as prepared by Gibson Dunn and mailed to all of GFC'S shareholders, filed with the SEC and otherwise publicly disseminated omitted to disclose, among other things, that:

(a) the FHLBB was concerned about Gibraltar's financial condition and the use of Gibraltar Savings' cash to pay dividends to GFC to be used to service GFC'S public debt (including 13-7/8% junk bonds) securities and to finance acquisitions for GFC, and that the FHLBB had required that GFC enter into a capital maintenance agreement which also included a restriction on GFC's future ability to cause Gibraltar Savings to pay cash dividends to GFC;

(b) GFC had caused its 1986 audited consolidated financial statements to be revised following the initial issuance of such financial statements to reverse the prior transfer of the Galleria from Gibraltar savings (whose financial statements were consolidated with GFC'S) to GCB (whose financial statements were not part of GFC/Gibraltar Savings' consolidated financial statements) and to establish the Galleria as a long-term investment, the reported value of which was not based on any independent real estate appraisal or comparison of value (and was impaired at the date such asset was reclassified to a long-term investment by a minimum of $30 million);

(c) certain officers and directors or First Gibraltar Mortgage Corporation (herein "FGMC") had received bonuses attributable to the sale of FGMC the end of 1986 equal to approximately $12 million;

(d) based upon existing facts there exists a likelihood that one or more of Gibraltar's management could be sued for mismanagement or other wrongful conduct or activities affecting Gibraltar and/or its securities holders; and

(e) Gibraltar's management is the subject of accusations of mismanagement and other wrongful conduct, threats of shareholder mismanagement lawsuits and pending litigation which could be covered by the amendments to Gibraltar's Articles of Incorporation and special retroactive indemnity and hold harmless agreements being proposed and recommended by management for shareholder approval and authorization.

41. Prior to GFC's 1987 Annual Meeting and the voting of proxies obtained as a result of GFC's 1987 Proxy Statement, Gibson Dunn (Gelber, Kleiner) were aware that GFC had actually executed and delivered the Capital Maintenance Agreement dated May 4, 1987 to the FHLBB thereby restricting GFC's ability to cause Gibraltar Savings to transfer cash to GFC in the form of dividends or otherwise and thereby jeopardizing GFC's ability to service debt payments on its public debt securities and to pay any further cash dividends.

42. At the GFC Annual meeting Gibson Dunn, knowing that GFC's 1987 Proxy Statement stated that Gibraltar Savings was the source for GFC's cash dividends but omitted to also report that such dividend payments had been recently restricted by the FHLBB and knowing that Gibraltar's management was the subject of accusations of wrongdoing, as previously reported by Gibraltar to the FHLBB, stated and confirmed to the Meeting that GFC's 1987 Proxy Statement was accurate and complete.

43. Following GFC's 1987 Annual Meeting and the voting of proxies obtained as a result of GFC's 1987 Proxy statement to approve the acquisition of First Savings Bank of Florida, and without any further notice to or vote of GFC's stockholders, the acquisition of First Savings Bank of Florida was consummated on terms substantially different from the terms set forth and described in the Proxy Statement and approved by GFC's stockholders.

44. As a result of the imposition of the Capital Maintenance Agreement and as otherwise required by the FHLBB in restricting the use of Gibraltar Savings' cash (depositors) resources by GFC, GFC was forced to sell Gibraltar savings $35 million of the preferred stock of its Gibraltar Savings of Washington subsidiary to generate sufficient cash to be able to consummate the acquisition of First Savings Bank and thereby reducing GFC's ownership interest in both Gibraltar Savings of Washington (which was the entity which actually acquired First Savings Bank of Florida) and First savings Bank of Florida.

45. Gibson Dunn (Gelber and Klainer) was aware that neither the existence or effect of the Capital Maintenance Agreement nor GFC's inability to finance the cash acquisition of First Savings Bank of Florida without the sale of a substantial ownership interest in GFC's wholly owned Gibraltar Savings of Washington subsidiary was disclosed in GFC's 1987 Proxy Statement used to solicit stockholder votes and approval for such proposed acquisition.

46. Gibson Dunn (Gelber and Kleiner) were aware that following GFC's 1987 Annual Meeting and the voting of proxies obtained as a result of GFC's 1987 Proxy Statement to approve the acquisition of First Savings Bank of Florida, that GFC had not thereafter solicited stockholder approval for the sale of $35 million of the preferred stock of Gibraltar Savings of Washington to Gibraltar Savings and/or the acquisition of only 70% of First Savings Bank of Florida for the same cash purchase price as was proposed to be paid by GFC to acquire 100% of First Savings Bank as reported in GFC's 1987 Proxy Statement.

47. On or about July 31, 1987, Gibson Dunn (Gelber, Kleiner), knowing that GFC had not attempted to re-solicit the approval of GFC's stockholders to obtain approval of the consummation of the acquisition of First Savings Bank of Florida upon the revised terms and conditions required in substantial part as a result of the Capital Maintenance Agreement the existence and effect of which had not been disclosed in GFC's

1987 Proxy Statement, participated and substantially assisted GFC to consummate the acquisition of First Savings Bank of Florida based upon the approval and authority of GFC's stockholders previously obtained as a result of the GFC 1987 Proxy Statement.

48. Gibson Dunn acted for Gibraltar in the consummation of the acquisition of First Savings Bank of Florida, and thereafter, and was paid by Gibraltar for the performance of such legal services.

49. The actual form of Acquisition Agreement, as entered into between GFC and First Savings, Bank of Florida, was prepared by Gibson Dunn (Gelber and Kleiner); and Gibson Dunn rendered its opinion as a condition to the closing of such acquisition transaction.

50. On or about May 23, 1987, Gibson Dunn (Gelber, Klainer, Washton), based upon the approval and authority of GFC's stockholders obtained as a result of GFC's 1987 Proxy Statement, participated and substantially assisted GFC to enter into Indemnity Agreements with GFC and Gibraltar Savings' officers and directors.

51. The actual form of Indemnity Agreement, as entered into by GFC and Gibraltar's officers and directors, was prepared by Gibson Dunn (Gelber, Kleiner).

52. On or about October 30, 1987, Gibraltar reported having incurred losses attributable to its commercial real estate activities during the three month period July 1, 1987 through September 30, 1987 of approximately $250,000,000.

53. On or about May 17, 1989, Gibraltar reported that it had previously entered into the capital Maintenance Agreement dated May 4, 1987 which Agreement included substantial restrictions on GFC's ability to cause Gibraltar Savings to pay dividends to GFC.

B. Special Investigation Committee

1. Gibson Dunn orchestrated and participated in a plan and scheme to cover up and conceal from Gibraltar's securities holders, the public markets for such securities and from Government regulatory agencies wrongful and actionable conduct by Gibraltar's management (and involving Gibson Dunn) including providing press interviews and communications directly with Gibraltar's securities holders where Gibson Dunn represented that Gibraltar's management had done nothing wrong -- which Gibson Dunn knew was not the case.

2. As early as February of 1986, Gibson Dunn (Gelber, Kleiner) knew that Gibraltar's management was representing in Gibraltar's securities offering and disclosure documents that Gibraltar's real estate investments were valued quarterly for financial statement purposes at the lower of cost or net realizable value based upon independent appraisal and comparisons of value which did not exist.

3. In September of 1986, Gibson Dunn (Washton) knew that Gibraltar's management cancelled an appraisal by Marshall & Stevens on the Galleria which reflected that Gibraltar had suffered a loss of at least $30 million attributable to its investment in the Galleria.

4. By at least March of 1987, Gibson Dunn (Washton) knew that Gibraltar's management had advised the FHLBB that there were no appraisals on the Galleria.

5. In March of 1987, Gibson Dunn (Gelber, Klainer, Washton) knew that Gibraltar's management had transferred the Galleria off Gibraltar's books and records (to GCB) and issued 1986 audited financial statements reflecting that Gibraltar did not own the Galleria at December 31, 1986 then subsequently re-conveyed the Galleria back to Gibraltar and reissued revised 1986 audited financial statements reflecting that the Galleria was owned and was being held as a long-term investment by Gibraltar at December 31, 1986 without reporting

or otherwise disclosing the existence of such two different sets of financial statements for the same period and as at the same date.

6. Prior to March 1987, Gibson Dunn (Gelber, Klainer, Washton) knew that Gibraltar had been attempting to sell its interest in the Galleria.

7. In May of 1987 at GFC's Annual Meeting of Shareholders, Gibson Dunn attended and participated in such Meeting where at Defendant Young reported that Gibraltar was attempting to sell or otherwise dispose of all of its commercial real estate investments.

8. In October of 1987, Gibson Dunn (Gelber, Kleiner, Washton) knew that the FHLBB had concluded and advised Gibraltar's management that Gibraltar was unsafe and unsound, but that Gibraltar had represented to and assured its shareholders in October of 1987, and again in January of 1988, that Gibraltar was in sound financial condition and should be profitable in 1988.

9. In April of 1987 Gibson Dunn (Gelber, Kleiner, Washton) knew that Gibraltar's management was the subject of an investigation into wrongdoing, threats of shareholder litigation and the target of actual pending litigation proceedings when Gibraltar's management represented in April of 1987 to shareholders in GFC's 1987 Proxy Statement and again at GFC's 1987 Annual Meeting held in May of 1987, that such management was not aware of any claims threatened or pending, or the basis for any future action, against Gibraltar's management that would be covered by special retroactive indemnity and hold harmless agreements in favor of Gibraltar's management as proposed and recommended by such management for approval and authorization by Gibraltar's shareholders at the Annual Meeting.

10. In October of 1987, Gibson Dunn (Gelber, Kleiner, Washton) knew that the substantial losses ($250,000,000) attributable to Gibraltar's commercial real estate activities reported by Gibraltar in October of 1987 as having been

incurred during the three month period ended September 30, 1987 had actually been incurred during the period 1985-1987 and, if properly and timely reported in the periods in which such losses were actually incurred, would have wiped out prior "Record Earnings" reported by Gibraltar's management for 1985 and 1986 (and would have invalidated the dividends declared and paid by Gibraltar's management during 1985-1986 period).

11. At the time of the events giving rise to the Complaint, Gibson Dunn had represented Gibraltar for over twenty years; and Gibson Dunn partner William Stinehart, Jr. was the son of Gibraltar's long-time General Counsel William Stinehart, Sr.

12. During the period covered by the Complaint, Gibson Dunn functioned as Gibraltar's "in-house" legal counsel doing virtually all of Gibraltar's legal work.

13. Gibson Dunn drafted and otherwise prepared all of Gibraltar's securities offering and disclosure documents and frequently drafted and otherwise prepared, or participated in the preparation of, Gibraltar's press releases, shareholder communications and Government regulatory communications.

14. By way of example, Gibson Dunn (Kleiner) drafted and otherwise prepared Gibraltar's 1985 Annual Report To The SEC on Form 10-K stating that Gibraltar's real estate investments were reported at the lower of cost or net realizable value based on independent appraisals and comparisons of value; and Gibson Dunn (Gelber, Kleiner) drafted and otherwise prepared GFC's 1987 Proxy Statement stating that there were no claims pending or threatened against Gibraltar's management (and failing to disclose that there were facts giving rise to such possible claims and litigation); and Gibson Dunn (Gelber) drafted and prepared, or participated in the drafting and the preparation of, Gibraltar's October 1987 press release announcing substantial losses attributable to Gibraltar's commercial real estate activities in the 3rd Quarter of 1987 (but

failing to disclose that the FHLBB and California Department of Savings & Loan had concluded that Gibraltar was unsafe and unsound as a result of substantial unrecorded losses [$500 million] attributable to Gibraltar's fixed rate mortgage-backed securities).

15. Following the announcement in October of 1987 that Gibraltar had suffered substantial losses attributable to its commercial real estate activities, Gibson Dunn (Washton) recommended that Gibraltar establish a "Corporate Policy Committee" subsequently renamed the "Special Litigation Committee" (herein collectively the "Special Litigation Committee") to investigate and report on the existence of any possible mismanagement or other wrongdoing by Gibraltar's management relating to the October 1987 loss announcement.

16. On November 17, 1987, a shareholder derivative lawsuit was filed in California Superior Court (Case No. CV-668149) captioned Weinberger, et al. v. Young, et al., seeking to recover on behalf of Gibraltar against Gibraltar's management damages suffered by Gibraltar as a result of the substantial losses suffered by Gibraltar attributable to its commercial real estate activities as reported by Gibraltar in October of 1987 (the "Derivative Action").

17. In its report to Gibraltar's shareholders published in GFC's Notice of Settlement To Shareholders Of Gibraltar Financial Corporation Common Stock dated August 12, 1988 drafted and otherwise prepared by Gibson Dunn (Washton), it was reported that the purpose of the Special Litigation Committee was to "review ... corporate policies, including those regarding lending, investments and liability management and the monitoring of the implementation of these policies and the divestiture program for investments in real estate ... expanded in December of 1987 to include all matters related to the derivative litigation and all issues related to or based upon the subject matter of the [shareholder derivative action] complaint and the extraordinary losses and unrealized losses disclosed in the third and fourth quarters of 1987".

18. The Special Litigation Committee was "headed-up" by Gibson Dunn attorney Washton, who also reportedly retained special counsel and professional accountants to assist the Committee in its investigation.

19. Subsequent to November 17, 1987, the first of several securities class action lawsuits was filed in Federal Court in Los Angeles (Consolidated Case No. CV 87-07876 NRP-BX) captioned In Re Gibraltar Financial Corporation Securities Litigation seeking to recover damages from Gibraltar and Gibraltar's management resulting from Gibraltar's failure to timely disclose substantial losses attributable to the Company's commercial real estate activities as reported by Gibraltar in October of 1987 (the "Class Action").

20. Gibson Dunn (Washton) acted as counsel of record for both Gibraltar and the Gibraltar management defendants in the Derivative Action and Class Action lawsuits.

21. Although the Special Litigation Committee was "headed-up" by Gibson Dunn (Washton), and purported to conduct an "independent investigation into possible wrongdoing by Gibraltar's management relating to the catastrophic losses ($250,000,000) suffered by Gibraltar attributable to its commercial real estate activities and otherwise in respect of any mismanagement or wrongdoing by Gibraltar's management, the report issued by Gibson Dunn on behalf of the Special Litigation Committee in GFC's Notice of Settlement dated August 12, 1988 stated that the Committee found no evidence of any actionable conduct by Gibraltar's management including defendants Young, Williamson and Nussbaum.

22. Gibson Dunn (Washton) also made several statements to the press that Gibraltar's management had done nothing wrong in respect of the substantial real estate related losses incurred by Gibraltar as reported for the 3rd Quarter of 1987.

23. For example, in April of 1989, the Los Angeles Times reported that Washton provided an interview with the L.A. Times and confirmed that the Special Litigation Committee found no evidence of fraud or gross mismanagement during the course of its investigation.

24. In September of 1989, Gibson Dunn attorney Washton was also quoted by the Los Angeles Daily Journal to have stated that, "There was absolutely no criminal conduct among bank operators. It was a case of a severe downturn in the stock market and heavy losses in the value of real estate. The directors didn't see it coming in time ... but that's simply bad business judgment."

25. In September of 1988 following the filing of the Derivative and Class Action lawsuits, Gibson Dunn attorney Washton personally telephoned one of Gibraltar's largest shareholders, D. Neubronner representing Mercatura Trust, and assured such shareholder that Gibraltar's management had done nothing wrong.

26. GFC's Notice of Settlement in the Derivative Action (the "Notice"), reporting that the Special Litigation Committee did not find any evidence of wrongdoing on the part of Gibraltar's management, was mailed to all of Gibraltar's securities holders and otherwise publicly disseminated on or about August 12, 1988.

27. The Notice identified Gibson Dunn as counsel for Gibraltar in the Derivative Action.

28. Based in substantial part upon the representations and assurances contained in the Notice, the Derivative Action was settled without Gibraltar receiving any recovery for monetary damages from Gibraltar's management as negotiated by Gibson Dunn (Washton) purporting to act on behalf of both Gibraltar and the Gibraltar management defendants.

29. Gibson Dunn's statements to the press, in the Notice to Gibraltar's shareholders and to Gibraltar's shareholders, that Gibraltar's management had done nothing wrong and that the Special Investigation Committee had found no basis to conclude there was any actionable misconduct by Gibraltar's management, was knowingly and intentionally false and misleading and was designed as part of the cover-up and concealment of wrongful and actionable misconduct by Gibraltar's management and by Gibson Dunn.

C. Securities Representation.

1. From approximately January of 1986 through April of 1989, Gibson Dunn was aware that Gibraltar had made false and misleading statements that affected and continued to affect public trading of Gibraltar securities which false and misleading statements had not been corrected; however, Gibson Dunn continued to author, prepare and disseminate and assist Gibraltar to prepare and disseminate securities offering and disclosure documents and otherwise assisted Gibraltar in connection with the offer and sale of securities and Gibraltar's public reporting in respect thereof.

2. On or about October 20, 1987, Gibson Dunn (Gelber/Kleiner) was aware that the FHLBB had provided Gibraltar with its Report of Target Examination dated October 16, 1987 and transmittal letter which concluded that Gibraltar was in an unsafe and unsound condition as a result of Gibraltar's portfolio of fixed rate mortgage-backed securities.

3. In October of 1987, Gibson Dunn was thus aware that Gibraltar had an unreported actuator anticipated future loss attributable to Gibraltar's portfolio of such fixed rate mortgage-backed securities of approximately $500 million.

4. On or about December 1, 1987, Gibson Dunn (Gelber) prepared and assisted Gibraltar to prepare a responsive letter to the FHLBB's Report of Target Examination

stating, among other things, that Gibraltar "does not concur with the Examiner's findings that the Association has ignored interest rate risk and has been placed in an "unsafe and unsound position" as a result of the mortgage-backed securities portfolio".

5. On or about October 29, 1987, Gibson Dunn (Gelber) attended a Special Meeting of Gibraltar's Audit Committee which considered the public disclosure of substantial losses attributable to Gibraltar's real estate loans and investments.

6. As a result of attending such Audit Committee Meeting, Gibson Dunn was aware that Gibraltar had incurred losses attributable to its real estate loan and investment portfolio during the period 1985-1987 of approximately $250,000,000.

7. Gibson Dunn (Gelber) prepared and participated in the preparation of a press release by Gibraltar dated October 30, 1987 which reported only that Gibraltar had incurred an after tax loss in the three months ended September 30, 1987 (the "3rd Quarter") attributable to its real estate loan and investment activities of approximately $154.6 million (after giving effect to possible tax benefits associated with such loss).

8. The October 30, 1987 press release prepared by Gibson Dunn did not disclose the existence of any communication from or position of the FHLBB (or California Department of Savings & Loan) including such Government Regulatory Agency's conclusion that Gibraltar was "unsafe and unsound" as a result of substantial unreported losses attributable to Gibraltar's portfolio of mortgage-backed securities.

9. On or about December 15, 1987, Gibson Dunn attorney Arthur W. Schmutz ("Schmutz") attended a special meeting of the Board of Directors of Gibraltar which included a presentation by representatives of the FHLBB and the California Department of Savings & Loan.

10. At the Meeting, the FHLBB and California Department of Savings & Loan advised Gibson Dunn and the other Gibraltar representatives in attendance at the Meeting that such Governmental Regulatory Agencies "were concerned about the financial condition of Gibraltar Financial Corporation and Gibraltar Savings and ... wanted assurance that the Directors of the two institutions understood the degree and nature of their concern."

11. The FHLBB representatives in attendance at the Meeting also provided Gibson Dunn and Gibraltar's other representatives at the Meeting with a letter dated December 15, 1987 stating, among other things, that "We have serious concerns about the company's earnings, asset quality, and capital, as well as its overall risk profile" and that "we believe that the Board of Directors should reevaluate immediately the possible measures and available alternatives to help insure the ongoing viability of the company. We request that you provide us with your plans to increase the company's GAAP capital, strengthen or augment management, reduce interest-rate risk exposure and dispose of problem assets."

12. Gibson Dunn subsequently received copies of a letter sent by the FHLBB dated January 22, 1988 stating that "The Association's managerial and its financial resources and its past and present operation performance is unsatisfactory. Further, in our opinion the proposed [$100 million] subordinated debenture offering will pose an undue burden upon the association's operations. Accordingly, we will not process the subject application for approval."

13. On or about January 29, 1988 Gibson Dunn (Gelber, Kleiner, Washton, Schmutz) were aware that Gibraltar's 1987 Annual Report To Shareholders as mailed to all of Gibraltar's securities holders, submitted to the SEC and otherwise publicly disseminated and Gibraltar's year-end earnings press release represented that Gibraltar was in "sound financial condition" and expected to be profitable for 1988.

14. Gibson Dunn was also aware that Gibraltar's 1987 Annual Report To Shareholders did not disclose that the FHLBB and California Department of Savings & Loan had concluded that Gibraltar was in an unsafe and unsound financial condition.

15. Gibson Dunn was also aware that in November 1987, Gibraltar's Chairman of the Board and Chief Executive officer, Herbert J. Young, had given interviews to the press stating that Gibraltar was stronger having taken its losses and that management had taken remedial steps to ensure that "this is not going to happen again" which statements had been publicly reported.

16. As a result of attendance at Gibraltar's Board Meetings held on October 26, November 3 and December 15, 1987 and otherwise, Gibson Dunn (Gelber, Schmutz) was aware that Gibraltar's senior management believed it was likely that Gibraltar would incur a substantial loss for the year ended December 31, 1988.

17. Gibson Dunn was aware that Gibraltar's management was issuing public statements at the time of GFC's 1988 Annual Meeting of Shareholders held May 20, 1988 confirming that Gibraltar would report a profit for the 4th Quarter of 1988 and Gibson Dunn (Gelber) attended Gibraltar's 1988 Annual Meeting and heard Gibraltar management report that the situation at Gibraltar was stabilized, that no additional surprises were expected and there was not cause for concern that Gibraltar would be the subject of any Government regulatory seizure or similar action since Gibraltar had adequate regulatory capital.

18. Contrary to prior public statements and assurances, in March of 1989, Gibraltar reported a loss for the 4th Quarter and year ended December 31, 1988 equal to $101 million; and on March 31, 1989, the FHLBB seized control of Gibraltar Savings.

19. In February of 1990, GFC filed for protection under the Federal Bankruptcy laws.

20. Gibson Dunn acted as legal counsel to Gibraltar in connection with the offer and sale of $190 million of Gibraltar Savings 8-7/8% Notes Due July 19, 1991 pursuant to a Prospectus dated June 24, 1988.

21. Gibson Dunn (Kleiner) drafted and otherwise participated in the preparation of the Gibraltar Prospectus dated June 24, 1988 which Prospectus was publicly disseminated.

22. Gibson Dunn drafted and otherwise participated in the preparation of GFC's 1987 Annual Report to the SEC on Form 10-K which was publicly disseminated.

23. During the period October 1987 when Gibson Dunn first learned that the FHLBB and California Department of Savings & Loan had concluded that Gibraltar was "unsafe and unsound" and January 1989 when Gibraltar first publicly announced that the FHLBB had declared Gibraltar Savings' "unsafe and unsound" and a troubled institution, Gibson Dunn prepared and assisted in the preparation of the following securities offering and/or disclosure documents, all of which were publicly disseminated: (a) Annual Report on Form 10-K for the year ended December 31, 1987; (b) Annual Report to Shareholders for the year ended December 31, 1987; (c) Current Report on Form 8-K dated March 3, 1988; (d) Definitive Proxy Material dated April 8, 1988; (e) Quarterly Report on Form 10-Q for the three months ended March 31, 1988; (f) Offering Circular dated June 24, 1988 covering the offer and sale of $190,000,000 Gibraltar Savings 8-7/8% Notes due July 29, 1991; (g) Quarterly Report on Form 10-Q for the three months ended June 30, 1988; (h) Registration Statement on Form S-8 dated August 12, 1988 covering 850,000 shares of GFC common stock to be issued under GFC's 1987 Stock Option Plan; (i) Quarterly Report on Form 10-Q for the three months ended September 30, 1988; (h) Annual

Report an Form 10-K for the year ended December 31, 1988; (k) Annual Report to Shareholders for the year ended December 31, 1988.

24. In January of 1986, Gibson Dunn (Kleiner) prepared Gibraltar's 1985 Annual Report to the SEC an Form 10-K.

25. Gibson Dunn (Kleiner) caused the following statement to be included in such securities disclosure document, "Real estate investments are carried at the lower of cost or net realizable value. Net realizable value is determined quarterly based on estimated sales value less estimated expenses and carrying costs through completion and sale of the project. Estimated sales values are based on independent appraisals or comparisons with sales prices of similar properties. Estimates of expenses and carrying costs are based on historical experience adjusted for factors such as anticipated inflation, cost of funds, etc.

26. At the time that Gibson Dunn caused such statement to be included in Gibraltar's 1985 10-K Report, Gibson Dunn knew (or was extremely reckless in not knowing) that Gibraltar had not obtained any independent appraisals or comparisons of value on most of Gibraltar's real estate investments.

27. During the period January 1, 1985 through September 30, 1987, Gibraltar obtained a total of one independent real estate appraisal and/or comparison of value on Gibraltar's approximately forty separate real estate investment properties (including GCB's properties).

28. In September of 1986, Gibson Dunn (Washton) was aware that Gibraltar cancelled an appraisal on the Galleria which was Gibraltar's largest single real estate investment.

29. The September 1986 appraisal by

Marshall & Stevens reflected a loss attributable to Gibraltar's investment in the Galleria of approximately $30 million which was approximately 60% of the $53 million loss reported by Gibraltar Savings in October of 1987 as having been incurred in respect of the Gallaria during the three months ended September 30, 1987.

30. Gibson Dunn was aware in March of 1987 that Gibraltar had prepared and issued two different versions of Gibraltar's 1986 audited consolidated financial statements (one of which reflected that the Galleria as not being owned by Gibraltar at December 31, 1986 and one of which reflected that Gibraltar was holding the Galleria as a long-term investment at December 31, 1986) without also disclosing the existence of such two different sets of financial statements and the reasons for the revisions to the first set of financial statements, the actual changes to such financial statements and/or the effect of such changes.

31. In March of 1987, Gibson Dunn knew that Gibraltar was not holding the Galleria as a long-term investment and that Gibraltar had tried unsuccessfully to sell its interest in the Galleria during 1986.

32. During the period January 1986 through October 1987 when Gibraltar finally announced losses attributable to its real estate loan and investment portfolio, Gibson Dunn prepared or participated and assisted in the preparation of the following securities offering and/or disclosure documents, all of which were publicly disseminated: (a) Current report on Form 8-K dated January 3, 1986; (b) Annual Report on Form 10-K for the year ended December 31, 1985; (c) Annual Report to Shareholders for the year ended December 31, 1985; (d) Amendment No. 1 to Annual Report on Form 10-K for the year ended December 31, 1985; (e) Definitive Proxy Material dated February 1, 1986; (f) Offering Circular dated April 7, 1986 covering the offering and sale of $100,000,000 Gibraltar Savings 7-1/2% Convertible Subordinated Debentures due 2006; (g) Registration Statement on Form S-3 dated April 22, 1986 covering

GFC's common stock underlying Gibraltar Savings 7-1/2% Convertible Subordinated Debentures due 2006; (h) Quarterly Report on Form 10-Q for the three months ended March 31, 1986; (i) Quarterly Report on Form 10-Q for the three months ended June 30, 1986; (j) Offering Circular dated July 15, 1986 covering GFC's offer to Exchange shares of its Capital Stock for up to $25,000,000 principal amount of its Floating Rate Subordinated Notes due 1991; (k) Current Report on Form 8-K dated August 15, 1986; (l) Definitive Proxy Material dated October 20, 1986; (m) Quarterly Report on Form 10-Q for the three months ended September 30, 1986; (n) Current Report on Form 8-K dated October 23, 1986; (o) Definitive Proxy Material dated October 28, 1986; (p) Registration Statement on Form S-3 dated November 14, 1986 covering the offering and sale of $99,500,0.00 GFC 13-7/8% Senior Subordinated Debentures due 2001; (q) Form T-1, Statement of Eligibility and Qualification dated December 11, 1986; (r) Prospectus dated December 15, 1986 covering the offering and sale of $99,500,000 GFC 13-7/8% Senior Subordinated Debentures due 2001; (s) Current Report on Form 8-K dated January 6, 1987; (t) Registration statement on Form S-4 dated January 9, 1987 covering the offering and sale of 1,250,000 shares of GFC common stock to be issued in conjunction with the acquisition of Santa Clara Savings; (u) Definitive Proxy Material dated January 23, 1987; (v) Annual Report to Shareholders for the year ended December 31, 1986; (w) Revised Annual Report to Shareholders for the year ended December 31, 1986; (x) Annual Report on Form 10-K for the year ended December 31, 1986; (y) Registration Statement on Form S-4 dated March 14, 1987 covering the offering and sale of 2.9 million shares of GFC common stock to be issued in conjunction with the acquisition of First Savings Bank of Florida; (z) Offering Circular dated March 24, 1987 covering the offer and sale of $200,000,000 Gibraltar Savings Medium-Term Notes Due from one Year to Five Years from Date of Issue; (aa) Current Report on Form 8-K dated May 13, 1987; (bb) Quarterly Report on Form 10-Q for the three months ended March 31, 1987; (cc) Quarterly Report on Form 10-Q for the three months ended June 30, 1987; (dd) Quarterly Report on Form 10-Q for the three months ended September 30, 1987.

33. Gibson Dunn continued to prepare, participate in the preparation of and assist Gibraltar to prepare and disseminate securities offering and disclosure documents during the time that Gibson Dunn knew that Gibraltar had made false and misleading statements which were likely to and were affecting and continued to affect the public trading market for Gibraltar's securities.

(5) Rifkind, Pondel & Parsons. Rifkind, Pondel Parsons (the "Rifkind Firm") and its principal Melvin Rifkind ("RifkInd") (referred to herein collectively as the "Rifkind Defendants") drafted, prepared, disseminated, participated in the preparation and assisted and aided and abetted GFC and Gibraltar Savings and Gibraltar's management, accountants and attorneys in the preparation and dissemination of Gibraltar's annual reports to shareholders, press releases and other communications to Gibraltar's securities holders, and to the public trading market for such securities, which the Rifkind Defendants knew, and/or were reckless and/or negligent in not knowing, were not accurate and complete in all material respects, including without limitation, GFC's 1986 year-end press release dated January 21, 1987 and GFC's 1986 Annual Report To Shareholders reporting "Record Earnings" and a "5O% Dividend Increase", the Chairman's report at GFC's 1987 Annual Meeting of Shareholders held May 22, 1987 stating that Gibraltar was in sound financial condition and GFC's 1987 Annual Report To Shareholders and the statement contained therein that Gibraltar was in sound financial condition. The Rifkind Firm is responsible for the wrongful and actionable conduct and activities of its representatives including Rifkind. The Rifkind Firm and defendant Rifkind purposefully, recklessly and negligently failed to conduct an adequate review of matters affecting Gibraltar and an investment in Gibraltar's securities for purposes of drafting, preparing and assisting Gibraltar's management including defendant Young to prepare communications to Gibraltar's securities holders, securities analysts and otherwise affecting the public trading market for Gibraltar's securities -- including without limitation the "President's Letter" contained in the two different versions of GFC's 1986 Annual Report To Shareholders. The Rifkind Firm

and defendant Rifkind were aware that GFC's 1986 Annual Report To Shareholders, including Gibraltar's 1986 audited consolidated financial statements included therein, as filed with the SEC in March of 1987 was not accurate and complete in all material respects, and the Rifkind Defendants participated, assisted and ,aided and abetted Gibraltar and Gibraltar's management and accountants and attorneys to change such audited consolidated financial statements to cover up and conceal such deficiencies including without limitation the reclassification of the Galleria as a long-term investment without disclosing that Gibraltar's investment in such asset had been substantially impaired at December 31, 1986. As a result of the nature of the shareholder communication services performed by the Rifkind Firm and defendant Rifkind, and the relationship and superior knowledge gained by the Rifkind Firm and Rifkind as a result of such relationship and services and Gibraltar's securities holders' dependence and reliance upon the performance of such position and services, the Rifkind Firm and Rifkind owed duties to Gibraltar's securities holders and the public trading market for Gibraltar's securities to ensure that all public statements by Gibraltar affecting the offer, sale and trading in such securities were accurate and complete in all material respects to the best of the Rifkind Defendants' knowledge. The Rifkind Defendants' wrongful and actionable conduct as complained of herein included the following:

A. <u>False And Misleading Statements.</u>

1. The Rifkind Defendants prepared and participated in the preparation of Gibraltar's 1985 and 1986 year-end press releases reporting "Record Earnings".

2. The Rifkind Defendants prepared and participated in the preparation of GFC's 1985 and 1986 Annual Reports To Shareholders reporting "Record Earnings".

3. The Rifkind Defendants prepared and participated in the preparation of the reports provided to those in attendance at GFC's 1985, 1986 and 1987 Annual

Shareholders' Meetings.

4. The Rifkind Defendants prepared and participated in the preparation of Gibraltar's press releases in 1985, 1986 and 1987.

5. Rifkind drafted and otherwise participated and assisted in the preparation of the President's Letter included in GFC's 1986 Annual Report stating that Gibraltar had achieved "Record Earnings" in 1986 meriting a 50% increase in dividends and stating that Gibraltar's earnings would be improving further as losses attributable to Gibraltar's real estate activities declined.

6. Rifkind drafted and otherwise participated and assisted in the preparation and dissemination of Gibraltar's 1986 year-end press release, issued under Rifkind's name, stating that Gibraltar had achieved "Record Earnings" for 1986 meriting a 50% increase in dividends.

7. Rifkind drafted and otherwise participated and assisted in the preparation of the President's Report at GFC's 1987 Annual Meeting held May 22, 1987 which stated that Gibraltar was in sound financial condition, that the Company's prospects for the future were favorable, and that the Company's general and administrative expenses were being effectively controlled.

8. The 1986 Annual Report, the 1986 year-end press release and the President's Report delivered at GFC's 1987 Annual Meeting were proxy solicitation materials within the applicable definition of such term.

9. Rifkind drafted and otherwise participated and assisted in the preparation of Gibraltar's October 30, 1987 press release announcing substantial losses attributable to Gibraltar's commercial real estate activities during the 3rd Quarter of 1987 and attributing such losses to "the decision to phase out its construction and development activities and to expedite the

disposal of real estate investments, rather than continue to hold them for investment".

10. Rifkind drafted and otherwise participated and assisted in the preparation of the President's Letter included in GFC's 1987 Annual Report which stated that Gibraltar was in sound financial condition and Gibraltar's 1987 year-end-press release stating that Gibraltar would be profitable for 1988.

11. Rifkind knew, or was extremely reckless in not knowing, that the statements made by Rifkind as referenced above were not accurate and complete in all material respects.

12. Rifkind knew at the time that he caused Gibraltar to publicly state in 1988 that the Company was in "sound financial condition" and would be profitable in 1988 that Gibraltar was undercapitalized, that Gibraltar was trying to sell assets to raise money, that Gibraltar's core savings & loan business was not profitable and that in all likelihood Gibraltar would incur a loss for 1988.

13. Rifkind knew that the real estate losses reported for the 3rd Quarter of 1987 had been incurred during the period 1985-1987.

14. Rifkind authored and disseminated statements to Gibraltar's securities holders and the public trading markets for such securities, including that Gibraltar was in sound financial condition and would be profitable for 1988, which he knew were not true and which he knew and intended would be relied upon by investors in determining to buy and sell Gibraltar's securities.

15. At the time in 1988 when he authored the statement that Gibraltar was in sound financial condition, Rifkind knew or was reckless in not knowing that the FHLBB and the California Department of Savings & Loan had

concluded that Gibraltar was undercapitalized and was unsafe and unsound.

16. Having undertaken the duties of shareholder and financial public relations consultant to Gibraltar, Rifkind and the Rifkind firm were responsible to ensure that all statements drafted and otherwise prepared and disseminated by them were accurate and complete in all material respects, and that if any such statements were later rendered or otherwise turned out to be false or misleading in any material respect then the Rifkind Defendants had a duty to correct any such false or misleading statements and otherwise time disclose such corrective information which duty the Rifkind Defendants failed and refused to perform.

17. Plaintiffs received and relied upon GFC's 1986 and 1987 Annual Report To Shareholders, including the President's Letters contained therein, in determining to purchase/sell Gibraltar securities.

B. The Rifkind Defendants Participation-in A Fraudulent Scheme, Plan And Course OF Business Utilizing Manipulative And Deceptive Devices And Contrivances Designed To Defraud.

1. Based on conversations between Rifkind and defendant Young, including interviews conducted by Rifkind with Gibraltar's management during the period from October 1986 through March 1987, in March of 1987 Rifkind knew and was otherwise aware that Gibraltar had substantial unreported losses attributable to its commercial real estate activities, including the Galleria, and otherwise.

2. Rifkind authored and otherwise participated and assisted in the preparation of Gibraltar's 1986 year-end press release dated January 21, 1987 which reported that Gibraltar had achieved "Record Earnings" meriting "a 50% Dividend Increase".

3. The 1986 year-end press release was disseminated by Rifkind under his and the Rifkind Firm's name.

4. Rifkind also authored the "President's Letter" and otherwise participated and assisted in the preparation of GFC's 1986 Annual Report To Shareholders reporting Gibraltar's "Record Earnings" and "50% Dividend Increase".

5. In early March of 1987, Rifkind and the Rifkind Firm received a report from Gibraltar (and Kim Baer, the design firm coordinating the production of the Annual Report) that the Annual Report had been printed and that copies had been issued to the SEC and otherwise.

6. On or about March 9, 1987 Rifkind learned from Gibraltar (and Kim Baer) that the Annual Report including the audited consolidated financial statements included therein were to be changed to reflect a retroactive transfer of the Galleria to Gibraltar effective December 31, 1986.

7. Rifkind knew that such change would result in the reporting of total assets and liabilities for Gibraltar as at December 31, 1986 in such revised Annual Report To Shareholders that were different than the prior audited assets and liabilities figures that were previously released in Gibraltar's 1986 year-end results press release dated January 21, 1987 as prepared and disseminated by Rifkind under his name.

8. In March and April of 1987, Rifkind and the Rifkind Firm revised and participated and assisted in revising GFC's 1986 Annual Report To Shareholders, including revising the text of the "President's Letter" included therein (although the original date of such Letter -- January 21, 1987 -- was left unchanged).

9. Rifkind and the Rifkind Firm reviewed and approved draft copy of such revised 1986 Annual as Report, and consulted with Gibraltar's management including

Young in respect of such revised Annual Report and the necessity and advisability of reporting therein the existence of the prior version of the 1986 Annual Report.

10. Rifkind and the Rifkind Firm participated and assisted in the preparation and dissemination of the revised 1986 Annual Report without reporting or otherwise disclosing the existence of the prior version of such Annual Report (and Gibraltar's audited consolidated financial statements included therein) or the changes and/or the effect of such changes to such Annual Report (and audited consolidated financial statements).

11. In April and May of 1987 and thereafter, the Rifkind Firm and Rifkind personally disseminated copies of GFC's revised 1986 Annual Report to various financial publications analysts and otherwise.

12. The Rifkind Firm and Rifkind sought to hide and conceal the existence of the initial version of GFC's 1986 Annual Report (and audited consolidated financial statements) by discarding and otherwise destroying all existing drafts and other copies of such original 1986 Annual Report.

74. Peat, Kang, Ernst, Dudley, Leventhal, Sprayregen, Gibson Dunn, the Rifkind Firm and Rifkind were all professionals retained by Gibraltar to advise, assist and otherwise render professional services to, for and on behalf of Gibraltar and its securities holders and, as such, owed professional, fiduciary and/or other duties to Gibraltar and its securities holders including without limitation duties of loyalty, care, candor and truthfulness in the Performance of such Professional duties, responsibilities and services involving direct and indirect communications with Gibraltar's securities holders and otherwise.

75. GFC's securities holders reasonably anticipated and relied upon the performance by Gibraltar's management and Gibraltar's professionals including Peat, Kang, Ernst, Dudley,

Leventhal, Sprayregen, Gibson Dunn, the Rifkind Firm and Rifkind (each of which/who was in a superior position to gain and utilize information concerning Gibraltar in the performance of their professional duties, responsibilities and services to, for and on behalf of Gibraltar and its securities holders), to perform such professional services in a manner which was reasonably anticipated to be and was in the best interest of Gibraltar and its securities holders and in compliance with all applicable statutory, professional and other legal duties and responsibilities of such persons and firms.

IX.

FRAUDULENT AND FALSE AND MISLEADING OMISSIONS

76. GFC and Gibraltar Savings under the direction and control of the management of such corporations covered-up, concealed, failed and refused to report and otherwise omitted from statements and reports made to the public trading market(s) for GFC and Gibraltar Savings' securities, and to holders of such securities including the Plaintiffs, certain material information about GFC and Gibraltar Savings' business, property, management, regulatory relationships, results of operations, financial condition and future prospects, including without limitation the following:

(1) that Gibraltar's Chairman of the Board and Chief Executive Officer, Herbert J. Young, was not competent to run the Company's business;

(2) that the Federal Home Loan Bank Board including the audit/examination staff of the Federal Home Loan Bank Board of San Francisco (herein collectively the "FHLBB") had been critical of Gibraltar's management and was unwilling to approve, among other things, Gibraltar Savings' application to issue additional debt securities because Gibraltar's managerial and financial resources, and its past and present operating performance, were not satisfactory;

(3) that Gibraltar's management operated the company and its savings and loan business in an unsafe and unsound manner in contravention and violation of applicable state and federal laws, rules and regulations including without limitation California Financial Code Section 6150 which mandated Gibraltar's management "to administer the affairs of and provide sound management" to the Company, and Federal Regulations (12 C.F.R. § 563.17(a)] which required federally insured financial institutions such as the Company to "maintain safe and sound management and "to pursue financial policies that are safe and consistent with . . . the purpose of insurance of accounts and are appropriate to their respective types of operations";

(4) that the Company and its savings and loan business had suffered substantial dissipation of its assets and capital due to violations of law, rules and regulations and to unsafe and unsound management practices, and that the Company was in an unsafe and unsound condition;

(5) that the FHLBB had notified Gibraltar Savings in writing that the FHLBB was concerned about Gibraltar Savings' management capabilities and performance; and were otherwise urging Gibraltar's senior management be replaced or otherwise changed;

(6) that FHLBB and California Department of Savings & Loan representatives had met with the directors and management of GPC and Gibraltar Savings in a special Joint Meeting of the Boards held December 15, 1987 to express that such officials were concerned about the financial condition of GFC and Gibraltar Savings and to obtain assurances from such Directors of GFC and Gibraltar Savings that they each personally understood the degree and nature of the concern of such Government regulatory officials;

(7) that Gibraltar's savings and loan business was not profitable, and that general and administrative expenses exceeded operating revenues;

(8) that GFC and Gibraltar Savings had committed substantial capital and funds to and embarked upon a commercial real estate lending and development program without adequate investigation of the advisability and feasibility of such new endeavors, and without any prior background or experience in such areas of commercial real estate lending, finance, development and investment;

(9) that GFC and Gibraltar Savings had committed Gibraltar to one particular mixed use commercial real estate project known as the Galleria located in Metairie, Louisiana which is a suburb of New Orleans (herein referred to as the "Galleria") -- which at the outset involved a total development commitment by the Company of $500 million -- without careful and prudent investigation, analysis and deliberation as to the feasibility and advisability of such endeavor;

(10) that Gibraltar selected and retained a real estate development partner for the Galleria project without adequate investigation as to the background and capabilities of such partner and, on information and belief, Gibraltar failed to learn or discover, among other things, that such partner and/or his real estate development businesses had previously been the subject of one or more bankruptcy proceedings;

(11) that Gibraltar's development partner for the Galleria was conducting and operating such project through the use of unsound and questionable business practices and payments and utilizing loan proceeds intended for the development of such project for his own personal benefit and for purposes unrelated to the development of the project and in contravention of applicable loan agreements and federal law;

(12) that Gibraltar had prepared, and caused its outside accountants and auditors to prepare, projections, forecasts and/or market studies which indicated that the Company could reasonably expect to incur and would incur substantial losses attributable to Gibraltar's investment in the Galleria;

(13) that an independent appraisal of the Galleria reflected an impairment of the value of Gibraltar's investment in the Galleria in excess of $30 million;

(14) that Gibraltar had incurred a substantial loss attributable to its participation in the Galleria project, and would incur substantial additional losses from its continued participation in the Gallaria project and, consequently, the Company had determined to sell its interest in the Galleria and thereby withdraw from further development participation and investment in such project;

(15) that Gibraltar had determined to sell, and was engaged in actual activities to sell, its interest in the Galleria, but that the Company's efforts to sell its interest in the Galleria were unsuccessful;

(16) that the Government agencies primarily responsible for regulating Gibraltar's savings and loan business had requested upon several occasions an independent real estate appraisal in respect of the Galleria, and that Gibraltar had not disclosed to such Government agencies the existence of an appraisal on the Galleria which had already been done and was available to be provided to such Government agencies and representatives (reflecting that the Company's investment in the Galleria had already been impaired in excess of $30 million);

(17) that Gibraltar decided, instead, to cancel and refuse to take physical delivery of the written appraisal report on the Galleria as prepared by such independent appraisal company based upon the contrived theory that such appraisal was no longer necessary because the Company had determined not to proceed with the development of a hotel and other facilities at the Galleria;

(18) that Gibraltar was not accounting for, valuing and reporting commercial real estate development activities and investments in accordance with previously announced policies and procedures in respect of such real estate

investments;

(19) that Gibraltar Savings' real estate investments were not being carried on Gibraltar's books and records at the lower of cost or net realizable value based upon independent real estate appraisals or comparisons of value with sales prices of similar properties as represented by Gibraltar including in the Company's 1985 Annual Report to Shareholders, the Company's Annual Report on Form 10-K to the Securities and Exchange Commission for the year ended December 31, 1985, Gibraltar Saving's Prospectus dated April 7, 1986, GFC's Prospectus dated December 15, 1986, the Company's 1986 Annual Report To Shareholders and the Company's Annual Report on Form 10-K to the SEC for the year ended December 31, 1986;

(20) that Gibraltar was consulting and conducting actual "strategy" sessions with one or more representatives of Gibraltar's outside accounting and auditing firms to develop a plan and a scheme whereby Gibraltar could avoid disclosing and reporting the substantial losses already incurred and anticipated to be incurred in respect of Gibraltar's commercial real estate loan, development and investment activities; and that in connection with such plan and scheme, and the implementation thereof, such accountant/auditors would alter and otherwise subsequently revise minutes and records of the deliberations and proceedings of one or more of Gibraltar's management committees and make and issue statements and opinions regarding Gibraltar's commercial real estate development loans and activities, including in respect of the Gallaria, which such accountant/auditors knew were not true and accurate in all respects; and that such false and misleading statements, opinions and advice were made in connection with the preparation and issuance of GFC and Gibraltar Savings' audited and unaudited financial statements and other reports thereby rendering such financial statements and reports false and misleading;

(21) that as a result of the rendering of such "strategic" accounting consultation, opinions and advice, and other consulting activities performed by one or more of Gibraltar's

outside accountant/auditors, Gibraltar's audited financial statements were not audited and prepared in accordance with generally accepted auditing procedures and accounting principles on a consistent basis; and were not audited, prepared, reviewed and/or reported upon by truly "independent" auditors and accountants as represented by Gibraltar and the Company's outside accountants and auditors in such audited financial statements and reports including without limitation the Company's audited financial statements for the years ended December 31, 1985, 1986 and 1987;

(22) that Gibraltar attempted to transfer Gibraltar's ownership interest in the Galleria to one of Gibraltar's real estate joint venture partners to get the Galleria off Gibraltar's own balance sheet as part of Gibraltar's effort to avoid the necessity of having to obtain an independent appraisal on the Galleria and/or otherwise report actual or anticipated losses attributable to Gibraltar's ownership of the Galleria known to Gibraltar;

(23) that GFC and Gibraltar Savings issued and filed with the SEC in early March of 1987 audited consolidated financial statements for the year ended and as at December 31, 1986 which reflected that Gibraltar's interest in the Galleria had, in fact, been transferred off of Gibraltar's balance sheet at December 31, 1986 (and an to one of Gibraltar's real estate development joint venture partner's balance sheet which was not included as part of GFC and Gibraltar Savings' consolidated balance sheet and other financial statements);

(24) that when the FHLBB indicated to Gibraltar that such government regulatory agency would not withdraw its request for an independent appraisal on the Galleria, Gibraltar rescinded the prior transfer and reinstated the Galleria as an asset of Gibraltar Savings reflected on GFC and Gibraltar Savings' consolidated balance sheet and other financial statements;

(25) that GFC and Gibraltar Savings had revised and reissued their audited consolidated financial statements for the year ended and as at December 31, 1986 to reflect Gibraltar's investment in the Galleria as an asset of Gibraltar Savings at December 31, 1986 without disclosing to the readers of such revised audited financial statements that Gibraltar had issued a prior set of such financial statements for the same period and at the same date which were different and without reporting or otherwise disclosing the revisions to such financial statements, the reasons for such changes and/or the effect of such changes;

(26) that as part of GFC and Gibraltar Savings' plan and scheme to cover up, conceal, and omit to disclose and report substantial losses attributable to Gibraltar's commercial real estate loan and investment activities and portfolio, Gibraltar, with the advice, consent, participation and assistance of Gibraltar's accountants, auditors and attorneys, and without appropriate disclosure thereof, changed its "policy" for accounting and reporting Gibraltar's real estate investments in 1986 from "lower of cost or net realizable value . . . based upon independent [real estate] appraisals to accounting and reporting for such investments" at cost less accumulated depreciation and then further changed such policy in 1988 to "cost less accumulated depreciation, subject to review for permanent impairment of asset value";

(27) that by the end of 1986 the value of Gibraltar Savings' real estate investments had been impaired by at least $150 million and that GFC and Gibraltar Savings had failed and refused to reflect such impairment of value (losses) on Gibraltar's books, records and financial statements or otherwise disclose such impairment of value (losses) to the public trading market for Gibraltar's securities, Gibraltar's securities holders including the Plaintiffs and applicable Government savings and loan and other regulatory agencies and representatives;

(28) that GFC and Gibraltar Savings were aware that the Company's investment in the Galleria project and other commercial real estate development projects were in

serious financial trouble and would ultimately result in losses by the Company totalling in excess of $150 million, and that such actual impairment of value and economic loss would surely have a materially adverse effect on Gibraltar and its future operations, financial condition and prospects;

(29) that GFC and Gibraltar Savings management had been accused of mismanagement and securities disclosure violations concerning, among other things, the Galleria and that Gibraltar and Gibraltar management were subject to shareholder derivative and other lawsuits which would be covered by the special retroactive indemnity and hold harmless agreements being proposed and recommended for shareholder approval by such Gibraltar management;

(30) that GFC and Gibraltar Savings had been the subject of claims and threats of legal action that Gibraltar had substantial unreported losses attributable to its commercial real estate loan and development activities and portfolio;

(31) that virtually every single commercial real estate loan ever made by Gibraltar Savings was in default, resulting in substantial losses to Gibraltar Savings (every single loan);

(32) that by the end of 1986 actual and anticipated future losses attributable to Gibraltar Savings' commercial real estate loan and investment activities and portfolio were in excess of $250,000,000 (in excess of a quarter of a billion dollars!);

(33) that Gibraltar Savings had purchased approximately $6.9 billion worth of fixed (interest) rate mortgage-backed securities rendering Gibraltar vulnerable to substantial losses resulting from the decreasing value of such securities in the event of an increase in interest rates creating a very volatile investment environment in respect of the purchase, sale and ownership of Gibraltar's securities;

(34) that Gibraltar did not take any steps to eliminate or substantially reduce Gibraltar's risk and exposure to a rising interest rate environment and resulting investment loss on such mortgage-backed securities portfolio (through the purchase and sale by Gibraltar of various available "hedge" instruments transferring all or a portion of such interest rate risk to a third party speculator for a stated price);

(35) that by the end of 1987, unreported losses attributable to the decline in market value of Gibraltar's portfolio of fixed rate mortgage-backed securities was in excess of $300 million;

(36) that the FHLBB, following special audit, had notified GFC and Gibraltar Savings in writing on or about October 20, 1987 that the FHLBB had concluded that Gibraltar had ignored interest rate risk and had been placed in an unsafe and unsound operating position as a result of Gibraltar's substantial portfolio of fixed rate mortgage-backed securities which the FHLBB had concluded represented an unrealized loss of approximately $500 million;

(37) that Gibraltar Savings had purchased a substantial portfolio of high-yield, so-called "junk", bonds from Drexel Burnham Lambert and, alleged herein upon information and belief, that one or more of Gibraltar's executives including defendant Young had received undisclosed compensation in respect of such purchase by Gibraltar (and/or the issuance of $99,500,000 in "junk" bonds (13-7/8's) by Gibraltar through Drexel Burnham);

(38) that Gibraltar's lack of competent management and impaired capital and liquidity made the acquisition of additional savings and loans, including without limitation First Savings Bank of Florida and Santa Clara savings, unsafe and unsound and did not constitute reasonable, sound, prudent management;

(39) that the FHLBB had notified the Board of Directors of GFC in writing by letter dated December 15, 1987 that the FHLBB had serious concerns about Gibraltar's earnings, asset quality and capital as well as Gibraltar's overall risk profile, and that the FHLBB letter advised the GFC Board to reevaluate immediately the possible measures and available alternatives to be considered and taken to help ensure the ongoing viability of the Company (as a "going concern");

(40) that FHLBB officials had advised Gibraltar during their special meeting with the GFC and Gibraltar Savings' Boards of Directors on December 15, 1987 that the FHLBB believed that Gibraltar should, among other things, increase the Company's GAAP capital and strengthen or augment management;

(41) that Gibraltar's GAAP capital was low and that the only feasible way for Gibraltar to raise capital was the sale of one or more of Gibraltar's subsidiary businesses;

(42) that in connection with and as a condition for Gibraltar Savings' acquisition of Santa Clara Savings, GFC was required by the FHLBB in May of 1987 to enter into a Government regulatory (so-called capital maintenance or net worth) agreement dated May 4, 1987 committing GFC to make whatever further capital contributions were necessary to ensure that Gibraltar Savings' regulatory capital (or net worth) was in compliance with applicable regulatory minimums, and restricting the payment of cash dividends by Gibraltar Savings to GFC upon which GFC was dependent to be able to meet interest obligations on its public debt securities, including GFC's 9-1/4's and 13-7/8's debt securities, and the payment of cash dividends on GFC'S Common Stock;

(43) that a substantial amount of Gibraltar's large deposits were generated through payment of high market or above market rates of interest and that such short-term deposits created a serious risk to Gibraltar if Gibraltar discontinued payment of such high or above market interest rates

on such deposits (and they were withdrawn) or the Government was unwilling to acknowledge or otherwise confirm that such large (above $100,000) deposits were covered by Government (FSLIC) deposit insurance;

(44) that by the end of 1987, virtually all if not all of Gibraltar Savings capital (net worth) computed for regulatory purposes consisted of so-called intangible "good will" (the excess purchase price paid by Gibraltar Savings over the fair market value of assets purchased when Gibraltar previously acquired several savings and loan businesses), and that Gibraltar savings had no substantial, amount of "regulatory capital"; and

(45) that based upon the FHLBB Examiner's determination in October of 1987 that Gibraltar was in an unsafe and unsound operating position and the concerns expressed by the FHLBB officials to Gibraltar in December of 1987 about Gibraltar's financial condition, and the Gibraltar Board's unwillingness to respond to the FHLBB's requested changes including a change of senior management for Gibraltar savings, Gibraltar Savings was subject to Government seizure and/or other regulatory action.

X.

RICO ALLEGATIONS

77. Beginning in approximately September of 1986 and continuing through April 30, 1989, defendants Young, Williamson, Thayer, Janis, Nussbaum, Mooney, Flournoy, Spitz, Sprayregen, Leventhal, Kang and Peat (herein collectively referred to as the "RICO Defendants") devised a plan and scheme to cover up, hide and conceal from GFC and Gibraltar Savings and from GFC and Gibraltar Savings' securities holders, the public trading market for such securities and certain Government regulatory agencies substantial unreported losses attributable to Gibraltar's commercial real estate loan and investment activities and portfolio and, further, the fact that Gibraltar's business was not profitable

and that Gibraltar's management was not competent to manage Gibraltar's business for the purposes of continuing to control such business in violation of the Racketeering Influenced and Corrupt organizations Act (herein "RICO").

78. The RICO Defendants organized and carried out their plan and scheme to defraud Gibraltar's securities holders and the public trading market for such securities through a series of meetings, communications and activities whereby such RICO Defendants organized and thereafter constituted and comprised a group and enterprise separate and distinct from GFC and Gibraltar Savings and the formal management organization for such corporate entities -- which business entities and the shareholder/owners were the intended victims of such illegal and corrupt activities by the RICO Defendants.

79. The RICO defendants kept secret the existence, objectives and activities of their collective effort from GFC and Gibraltar Savings formal management bodies and shareholder/owners and from Government agencies responsible for regulating the business and activities of Gibraltar.

80. Each of the RICO Defendants had a substantial vested interest in the success of their RICO enterprise, including without limitation the continuation of the substantial amounts of money being paid to such RICO Defendants, and each of them, by Gibraltar for the performance of management, accounting, auditing, and/or other services to, for and on behalf of Gibraltar and its shareholder/owners by such RICO Defendants.

81. Each of the RICO Defendants participated in the planning and carrying out of the RICO enterprise which such participants knew involved violation of federal securities, mail and wire fraud statutes, including the following particular conduct and activity by each of such participants:

(1) In September of 1986, defendant Young concurred in the cancellation of an independent real estate appraisal on the Galleria by Marshall & Stevens reflecting

substantial losses attributable to Gibraltar's ownership in such property having previously and thereafter used the U.S. mails to disseminate communications to Gibraltar's securities holders stating that Gibraltar's commercial real estate investments were valued at the lower of cost or net realizable value based upon independent real estate appraisals including without limitation GFC's 1985 and 1986 Annual Reports To Shareholders mailed to all of Gibraltar's securities holders;

(2) In January 1988, defendant Young authored and disseminated his "President's Letter" dated January 29, 1988 stating that Gibraltar was in sound financial condition as sent via the U.S. Mail to all of Gibraltar's securities holders at a time when Young knew that Gibraltar was experiencing serious financial difficulties, needed more capital and was forced to attempt to sell one or more of its existing businesses to raise capital and increase liquidity;

(3) In January of 1988, defendant Young authorized the use of the U.S. Mails and interstate wire services to disseminate the projection that Gibraltar should be profitable for 1988 at a time when Young knew that Gibraltar's general and administrative expenses exceeded revenues and that it was likely that Gibraltar would incur a substantial loss for 1988 and beyond;

(4) Defendant Williamson, having concurred in the decision to cancel the Marshall and Stevens appraisal on the Gallaria and having authorized and directed the alteration of minutes and records of Gibraltar's management committee meetings reflecting that the Galleria was held for sale subject to net realizable value computations, authorized the sending via the U.S. Mails of the second ("bogus") version of GFC's 1986 Annual Report To Shareholders to all of Gibraltar's securities holders in approximately April of 1987 together with GFC's 1987 Proxy Statement dated April 6, 1987 representing that Gibraltar's Board of Directors including Williamson were not

aware of the existence of any claims of mismanagement or similar misconduct or wrongdoing by Gibraltar's management;

(5) Defendant Janis concurred in the decision to cancel the Marshall & Stevens appraisal on the Galleria in September of 1986 and, thereafter, authorized the sending via the U.S. Mails of the second GFC ("bogus") version of the 1986 Annual Report To Shareholders to all of Gibraltar's securities holders in approximately April of 1987 together with GFC's Proxy Statement dated April 6, 1987 representing that GFC's Board of Directors including Janis were not subject to any claims of mismanagement or actionable conduct;

(6) Having previously been physically and mentally unable to perform his duties as a director of Gibraltar due to a serious ongoing illness and disability, Janis caused GFC to prepare and disseminate through the U.S. Mails GFC'S Proxy Statement for the 1988 GFC Annual Meeting of Shareholders announcing defendant Janis as the newly elected Chairman of the Board of Directors of GFC and Gibraltar Savings and proposing his re-election to such Boards for the ensuing year without any reference to Mr. Janis' past or current condition and ability to perform the duties and responsibilities required of the person filling such positions at a critical time in Gibraltar's corporate history;

(7) Following his re-election, defendant Janis reported to Gibraltar's securities holders in attendance at the GFC 1988 Annual Meeting of Shareholders held on May 20, 1988 that there was no real danger of insolvency like Continental Illinois Bank because Gibraltar had an excess of net worth over required regulatory minimums without also informing such securities holders that Gibraltar's capital was low and the FHLBB had previously notified Gibraltar that the FHLBB believed Gibraltar needed to increase its capital and that Gibraltar was in an unsafe and unsound operating position and was subject to government seizure;

(8) Defendant Thayer authorized the use of the U.S. Mails in approximately June of 1988 to send all of Gibraltar's securities holders a copy of the June 1988 Special Edition of the Gibraltar Journal which reported and repeated Thayer's statements to Gibraltar's securities holders at GFC's 1988 Annual Meeting that Gibraltar's situation had stabilized and that no new surprises were expected at a time when Thayer knew that Gibraltar's capital was low, that Gibraltar was seeking to raise capital and increase cash resources through the sale of one or more of its subsidiary businesses including Gibraltar MoneyCenter and that the FHLBB had previously notified ,Gibraltar that the FHLBB believed Gibraltar needed to raise more capital and that Gibraltar was in an unsafe and unsound operating position (and subject to Government seizure or other regulatory action);

(9) Thayer authorized the use of the U.S. Mails to disseminate Gibraltar's 1986 audited consolidated financial statements to Gibraltar's securities holders in April of 1987 knowing that such audited financial statements had been changed from a previous version filed with the SEC in March of 1987 and that such second ("bogus") version of such financial statements, and accompanying GFC 1986 Annual Report To Shareholders and GFC 1987 Proxy Statement dated April 6, 1987, did not report or otherwise reflect that Gibraltar's 1986 audited financial statements had been revised or what the changes were or what the effect of the changes were and why they were made;

(10) Defendant Nussbaum authorized the use of the U.S. Mails to disseminate the second ("bogus") version of Gibraltar Savings' 1986 audited financial statements stating that Gibraltar's intention was to hold the Galleria as a long term investment when Nussbaum knew that Gibraltar's actual desire and intention was to sell the Galleria because he had personally been active in Gibraltar's efforts to sell the Galleria;

(11) Defendant Nussbaum personally instructed that Marshall & Stevens' independent real estate appraisal on the Galleria be cancelled having previously and subsequently authorized the use of the U.S. Mails to disseminate

statements by Gibraltar that Gibraltar's commercial real estate investments ,were valued at the lower of cost or net realizable value.based on independent real estate appraisals;

(12) In January of 1987, defendant Nussbaum reviewed and approved for issuance, using the U.S. Mails and interstate wire communications, GFC and Gibraltar Savings' press release stating that Gibraltar had achieved record earnings in 1986 of approximately $49 million warranting a 50% increase in GFC's dividend on its Common Stock at a time when Nussbaum knew that Gibraltar had substantial unreported losses attributable to its commercial real estate loan and investment activities and portfolio and had personally caused to be cancelled an independent appraisal on the Galleria reflecting a loss in respect of such property in excess of $30 million;

(13) Defendant Mooney prepared and authorized the distribution of Gibraltar's consolidated financial statements for the years ended and as at December 31, 1985, 1986 and 1987, and for the intervening quarterly periods, through the use of the U.S. Mails which financial statements Mooney knew at the time they were disseminated were materially false and misleading and did not report or otherwise reflect substantial losses attributable to, among other things, Gibraltar's commercial real estate lending and investment activities and portfolios;

(14) Defendant Sprayregen, and through his actions and conduct Leventhal, authorized and directed the alteration of minutes and records of Gibraltar management committee meetings reflecting the fact that the Galleria was subject to net realizable value (impairment of value) computations in 1986 and, thereafter, used the U.S. Mails to deliver a letter dated March 6, 1987 containing fraudulent and false and misleading statements concerning the Galleria including the statement that no projections or forecasts for the Galleria were available although Sprayregen and Leventhal had previously participated in the preparation of such projections and forecasts reflecting a substantial loss attributable to Gibraltar's ownership of the Galleria;

(15) Defendants Sprayregen and Leventhal knowingly and/or recklessly issued false and misleading reports and opinions on and otherwise certified Gibraltar Community Builder's financial statements including GCB's audited financial statements for the year ended and as at October 31, 1986 which Sprayregen and Leventhal caused to be disseminated through the use of the U.S. Mails to one or more recipients of such financial statements and Leventhal's report and opinion thereon;

(16) Defendant Kang, and through his actions Peat, authorized and prepared one or more back-dated representation letters from Gibraltar's management concerning Gibraltar's intention to hold the Galleria as a long-term investment following the time Kang and Peat knew that Gibraltar had tried to sell the Galleria and had transferred its ownership in the Gallaria to GCB and following the time Peat through Kang had already issued its audit report and opinion on Gibraltar's 1986 audited consolidated financial statements dated January 21, 1987 reflecting the fact that Gibraltar did not own the Galleria at December 31, 1986;

(17) Kang and Peat requested, authorized and directed Sprayregen and Leventhal to prepare and forward to Kang and Peat through the U.S. Mails a letter dated March 6, 1987 to be used for purposes of revising Gibraltar's previously issued 1986 financial statements and stating in such letter, as true, certain facts and opinions concerning the Galleria which Kang, Peat, Sprayregen and Leventhal knew were not true;

(18) Defendants Kang and Peat knowingly and/or recklessly issued false and misleading reports and opinions on Gibraltar's financial statements including Gibraltar's audited financial statements for the year ended and as at December 31, 1986 and 1987 which, upon information and belief, Kang and Peat caused and authorized to be disseminated using the U.S. Mails to one or more recipients of such financial statements and reports and opinions thereon;

(19) The so-called Gibraltar "Special Litigation Committee" was not an independent or outside fact finding body and effort intended to actually investigate and report objectively to Gibraltar's securities holders and the public market for such securities in respect of Gibraltar management's culpability and accountability for Gibraltar's real estate related losses but, instead, was an orchestrated effort by the RICO Defendants to "white wash" and hide and conceal the true facts regarding the incompetence and legal culpability, and financial accountability, of such RICO Defendants in respect of such catastrophic real estate related losses and otherwise;

(20) As part of the RICO Defendants' plan and scheme to cover up and conceal the true facts and actionable conduct by such Defendants, the RICO Defendants caused and reported the purported voluntary "retirement" of defendant Young and the "reassignment" of Messrs. Williamson and Nussbaum and the assumption of management responsibility by other RICO Defendants including Thayer and Janis (who would carry on and carry out the objectives of such RICO enterprise); and such RICO Defendants failed and refused, notwithstanding the FHLBB's insistence, to secure the services of new management who was not part of the RICO enterprise and who would be, therefore, in a position to expose the existence of the RICO enterprise and its members and its fraudulent and illegal conduct and activities in control of Gibraltar to Gibraltar's securities holders, the public market for such securities and the Government agencies responsible for supervising and regulating Gibraltar's savings and loan business and public reporting duties and responsibilities under the securities laws;

(21) As part of the RICO Defendants' plan and scheme to cover up and conceal the true facts and actionable conduct by such Defendants, the RICO Defendants have sought to extend their control and management over Gibraltar by among other things, continuing Messrs. Thayer, Flournoy and Spitz as constituting the only members of the Board of Directors of GFC and by failing and refusing to call and hold a GFC shareholders meeting to elect new directors and otherwise

cause GFC to take action in respect of its pending bankruptcy proceeding and the matters which are the subject of this complaint, notwithstanding applicable legal requirements that such shareholders meetings and election be called and held for such purposes;

(22) As part of the RICO Defendants plan and scheme to cover up and conceal the true facts and actionable conduct by such Defendants, one or more of such RICO Defendants has given perjured testimony in ensuing GFC shareholder litigation against such defendants including defendant Hussbaum who gave sworn testimony that he never knew that Marshall & Stevens had performed any appraisal work an the Galleria, and defendant Spitz who stated under penalty of perjury in responses to interrogatories that he had no discussion with anyone regarding the consideration of changes or any actual changes to the form and content of GFC and Gibraltar Savings' audited consolidated financial statements for the year ended and as at December 31, 1986; and

(23) As part of the RICO Defendants' plan and scheme to cover up and conceal the true facts and actionable conduct by such Defendants, the RICO Defendants filed court documents representing to be true facts which such Defendants knew were not true such as the fact that the Gallaria was not intended to be covered by Gibraltar's prior representation regarding the quarterly valuation of Gibraltar's commercial real estate investments at the lower of cost or net realizable value based upon independent real estate appraisals because prior to December 1986 properties held as joint ventures or partnerships such as the Gallaria were not covered by such representation knowing that virtually all, if not all, of Gibraltar's commercial real estate investments prior to December 1986 were held as joint ventures or partnerships.

82. The foregoing actions by the RICO Defendants and each of them constituted multiple violations of the federal mail fraud statute (18 USC § 1341) and federal wire fraud

statute (18 USC § 1343) in that such conduct and activities constituted a willful scheme to defraud persons of their money and property utilizing the U.S. Mails and interstate wire facilities in furtherance of such scheme.

83. The foregoing actions by the RICO Defendants and each of them constituted multiple violations of the federal securities laws including 15 USC § 78a et seq. and Rule 10b-5 promulgated thereunder, 17 C.F.R. S 240.10b-5.

84. The RICO defendants conduct as referenced herein took place on a continuous basis over a substantial period of time and is continuing to date.

85. The above-referenced actions by the RICO Defendants and each of them constituted a "pattern" of illegal conduct and activities cognizable under RICO in that, together, they constituted part of an overall, continuous and related plan and scheme of the RICO Defendants which involved multiple, continuous and related illegal acts over a substantial period of time in furtherance of such overall plan and scheme but which, individually, constituted and comprised separate and distinct, multiple plans, schemes and violations of the federal securities and mail and wire fraud statutes and individual mailings, acts, transactions and occurrences in furtherance thereof.

86. The above-referenced actions and conduct by the RICO Defend ants constituted RICO violations in that Plaintiffs' and each of them, have been proximately injured in their business or property (specifically losses attributable to their ownership of Gibraltar's securities) resulting from the RICO Defendants' utilization of a pattern (numerous and continuous related mailings, acts, transactions, schemes and occurrences over a period of several years) of "racketeering activity" (numerous predicate acts of federal securities and mail and wire fraud violations) so as to affect the Company which was and continues to be engaged in interstate commerce in conspiring to and actually acquiring and maintaining an interest in and control of the company through such pattern of racketeering activity and by

conducting and causing to be conducted through, and participating in, a pattern of racketeering activity by, and constituting the business of, the Company, as more particularly described above.

87. Defendants Young, Williamson, Thayer, Janis, Nussbaum, Mooney, Flournoy, Spitz, Sprayregen, Leventhal, Kang and Peat (herein collectively and individually the "RICO Defendants") constituted an association in fact and an enterprise which operated separately and distinctly from Gibraltar and the legitimate business of Gibraltar and the formal, statutory management of Gibraltar; which association and enterprise of RICO Defendants was consensual and designed for the benefit and purposes of such RICO Defendants.

88. The RICO Defendants, and each of them, caused and participated in the conduct of racketeering activities by the RICO association and enterprise by performing the acts referenced above in paragraphs 77 through 87.

89. As a direct and proximate result of the Defendants RICO activities as alleged herein and in reliance thereon, the Plaintiffs, and each of them, purchased, held and/or sold securities of Gibraltar and suffered injury and damages to such property occasioned by the diminution in value of such securities following disclosure of some of the wrongful activities of said RICO Defendants in an amount to be proven at trial but in any event, in excess of an aggregate of $850,000.

XI.

FURTHER MISCELLANEOUS ALLEGATIONS

90. All of the defendants owed Gibraltar and Gibraltar's securities holders heightened fiduciary, professional and other duties of care, timely communication, truthfulness and compliance with applicable Government laws, rules and regulations due to the nature of Gibraltar's financial institutions business.

91. Defendant Harrison, as general legal counsel for Gibraltar and its securities holders, owed Gibraltar and Gibraltar's securities holders heightened duties of professional care and responsibility due to the nature of Gibraltar's financial institutions business including the duty to ensure that Gibraltar and its management (officers and directors) complied with all applicable laws, rules and regulations pertaining to Gibraltar's financial institutions business, corporate governance and securities disclosure and related requirements.

92. Defendants Peat and Kang, as outside independent certified public accountants and auditors for Gibraltar and its securities holders, owed Gibraltar and its securities holders heightened duties of professional care and responsibility due to the nature of Gibraltar's financial institutions business.

93. Peat and the accountants at Peat had a duty to supervise Peat's other accountants, employees and representatives including without limitation, Kang and Mr. Samuel Yellen, Ms. Linda McCall. Mr. Richard Magnuson, Ms. Barbara Middleton, Mr. Michael Ramos, Mr. Chip Schmidt and Ms. Amy Wissman to ensure that they properly performed their professional duties and responsibilities to Gibraltar and its securities holders.

94. Defendants Ernst and Dudley, as outside independent certified public accountants for Gibraltar and its securities holders, owned Gibraltar and its securities holders heightened duties of professional care and responsibilities due to the nature of Gibraltar's financial institutions business.

95. Ernst and the accountants at Ernst had a duty to supervise Peat's other accountants, employees and representatives including without limitation Mr. Dudley, Mr. Harold J. Masor, Mr. Timothy C. Wright, Mr. Guy Wilson, Mr. Leroy Gardner, Mr. Greg Saukup, Mr. Walter Baran and Mr. John Owens to ensure that they properly performed their professional duties and responsibilities to Gibraltar and its securities holders.

96. Defendants Leventhal and Sprayregen, as outside independent certified public accountants and auditors for Gibraltar, GCB and in respect of the Galleria, owed Gibraltar and its securities holders heightened duties of professional care and responsibilities due to the financial institutions nature of Gibraltar's business.

97. Leventhal and the accountants at Leventhal had a duty to supervise Leventhal's other accountants, employees and representatives including without limitation Sprayregen, Michael Embree, Mr. Wallace A. Little, Mr. J. Paul De Myer, Ms. Joan Malcolm, Mr. Stephen Kurth, Mr. Ken Townsend, Mr. Stuart Tillman, Mr. John Hawkinson and Mr. George Struve to ensure that they properly performed their professional duties and responsibilities to Gibraltar and its securities holders.

98. The Rifkind Firm and Rifkind, as Gibraltar's outside financial public relations and shareholder communications firm and advisors, owed heightened duties of professional care and responsibility to Gibraltar and its securities holders due to the nature of Gibraltar's financial institutions business.

99. The Rifkind Firm and the other professionals at such Firm had a duty to supervise the Firm's other professionals, employees and other representatives thereof including without limitation defendant Rifkind to ensure that they properly performed their professional duties and responsibilities to Gibraltar and its securities holders.

100. Defendant Gibson Dunn, as legal counsel for Gibraltar and its securities holders, owed Gibraltar and its securities holders heightened duties of professional care and responsibilities due to the nature of Gibraltar's financial institutions business and the role that Gibson Dunn assumed in representing Gibraltar's Corporate Policy/Special Litigation Committee and its members and advisors in the investigation of possible wrongdoing by Gibraltar's management in connection with the announcement by Gibraltar in October of 1987 of

previously unreported losses attributable to Gibraltar's commercial real estate related activities and portfolio of approximately $250,000,000 and in undertaking to represent both Gibraltar and its management in shareholder derivative and other litigation relating to such real estate related losses and Gibraltar management's duties, responsibilities, obligations and liabilities in respect thereof.

101. Gibson Dunn and the attorneys at Gibson Dunn had a duty to supervise Gibson Dunn's other attorneys, employees and other representatives including without limitation Washton, Gelber, Kleiner and Schmutz to ensure that they properly performed their professional duties and responsibilities to Gibraltar and its securities holders.

102. As a result of the conduct and activities as alleged in this Complaint, all of the defendants breached their fiduciary, professional and/or other duties and responsibilities to Gibraltar and Gibraltar's securities holders; and defendants Peat, Ernst, Leventhal, the Rifkind Firm and Gibson Dunn, and the accountants, attorneys and/or other professionals constituting, comprising and representing such firms, breached their duty to properly supervise the accountants, attorneys and/or other professionals performing such professional services, to for and on behalf of Gibraltar and its securities holders.

103. Defendants Peat, Ernst, Leventhal, the Rifkind Firm and Gibson Dunn as part of their professional duties and responsibilities to Gibraltar and its securities holders, were obligated to notify Gibraltar and its securities holders whenever any such professional defendants became aware that Gibraltar's management (including herein Gibraltar's officers and directors) were engaged in any wrongful, actionable and/or illegal conduct or activity; and such defendants breached such professional duties and responsibilities to Gibraltar and its securities holders as a result of the conduct and activities as alleged in this Complaint.

103A. Defendant Flournoy failed to properly perform his duties and responsibilities to Gibraltar and its securities holders including management of Gibraltar, the supervision of Gibraltar's officers and the investigation and report to Gibraltar's securities holders by the Corporate Policy/Special Litigation Committee, as a result of Mr. Flournoy's conflicting duties and responsibilities for his other corporate interests, such as Fremont General Corporation, Lockheed Corporation and Tasco Corporation, which like Flournoy are thus responsible for Flournoy's failure to properly perform his duties and responsibilities to Gibraltar.

104. During the period covered by the Complaint, the Defendants, and each of the, took action to conceal from Gibraltar's shareholders, the public market for Gibraltar's securities and Government agencies responsible for regulating Gibraltar the existence of mismanagement and wrongdoing by Gibraltar's officers, directors and other representatives (including accountants and attorneys) including the following: (a) Gibraltar's management cancelled the Marshall & Stevens appraisal on the Gallaria in September of 1986, and thereafter reported to the FHLBB that there was no appraisal on the Gallaria; (b) in March and April of 1987, Gibraltar's management, accountants, attorneys and financial public relations firm prepared and issued two different sets of Gibraltar's 1986 audited consolidated financial statements and 1986 Annual Report To Shareholders; Gibraltar's management, accountants, attorneys and financial public relations firm transferred,the Galleria to GCB prior to the close of Gibraltar's 1986 fiscal year (and after the close of GCB's October 31, 1986 fiscal year) and then, following December 31, 1986, retroactively reinstated the Galleria on Gibraltar's books, records and Balance Sheet as at December 31, 1986 and reclassified the Galleria as a long-term investment; (c) in January of 1987 and thereafter, Gibraltar's management and accountants falsified corporate minutes and representation letters to reflect that the Galleria was being held as a long-term investment and to otherwise cover up and conceal the losses attributable to Gibraltar's investment in such property and the fact that such real estate investment had never been valued quarterly for financial

reporting purposes using any independent appraisal or comparison of value; (d) in April of 1987, Gibraltar's management, accountants and attorneys made and endorsed false statements to Gibraltar's securities holders and the public markets for such securities including that there was no basis for any claims of mismanagement or other wrongdoing by such management and that there were no claims threatened or pending against such management that would be covered by the special retroactive indemnity and hold harmless agreements and amendments to Gibraltar's Articles of Incorporation that Gibraltar's management was proposing and recommending for shareholder approval and authorization in favor of Gibraltar's management; (e) in and April of 1987, Gibraltar's attorneys wrote letters and otherwise assured Gibraltar's securities holders that Gibraltar's real estate was valued and reported correctly and fairly and that Gibraltar's management was not involved in any wrongdoing or cover-up relating to Gibraltar's real estate investments and the reporting thereof in Gibraltar's financial statements; (f) following the implementation of the special retroactive and hold harmless agreements, in October of 1987 Gibraltar's management, accountants, attorneys and public relations firm reported substantial real estate related losses that had actually been incurred during the 1985-1987 period as having been incurred only during the three months ended September 30, 1987 and attributed such losses to a recent drop in the stock market and a resulting drop in real estate values; Gibraltar's management, accountants and attorneys purported to conduct a special independent review and investigation into any possible wrongdoing by Gibraltar's management relating to the October 1987 announcement by Gibraltar of substantial real estate losses incurred in the 3rd Quarter of 1987 and subsequently issued a report that the review and investigation did not find any basis to conclude that Gibraltar's management had done anything wrong or actionable; (g) based upon the results of such purported investigation, in August of 1988, Gibraltar participated in and announced a settlement of a shareholder derivative claim negotiated by Gibraltar's management and attorneys whereby Gibraltar did not receive any monetary damages or other similar relief from any of Gibraltar's management in respect of any mismanagement or wrongdoing by such management in respect of

Gibraltar's real estate related losses or otherwise; (h) in March of 1988 Gibraltar's management and attorneys reported that several of Gibraltar's senior executives (Young, Williamson and Nussbaum) had voluntarily retired and/or been reassigned to other positions when, in truth and in fact, such management representatives had been fired; (i) during the period October 1987 through January of 1989, Gibraltar's management, accountants, attorneys and public relations firm failed and refused to report, and concealed, that the FHLBB and other Government regulatory agencies were very critical of Gibraltar's management, results of operations and financial condition and had required Gibraltar to enter into extraordinary agreements to maintain capital in Gibraltar's savings and loan subsidiaries and restrict the payment of dividends by such subsidiaries to Gibraltar to pay cash dividends to Gibraltar's shareholders and service Gibraltar's public debt securities including without limitation a sale and issuance by Gibraltar of "junk-bond" (13-7/8% coupon rate) while at the same time reporting that Gibraltar's regulatory capital was adequate and there was no possibility that the Government would take regulatory action against Gibraltar; (j) in May of 1987, December of 1987, January of 1988 and thereafter, Gibraltar's management announced that Gibraltar was in sound financial condition and failed and refused to report, and concealed the fact that the FHLBB and California Department of Savings & Loan had concluded an reported in October of 1987 that Gibraltar was unsafe and unsound and should replace existing management and seek to sell or merge the company with a much stronger financial institution to ensure the viability of the company; (k) in May of 1988 and thereafter, Gibraltar's management continued to report and otherwise assure Gibraltar's securities holders and the public markets for such securities that Gibraltar's situation was stabilized, Gibraltar would be profitable in 1988 and that no additional surprises were anticipated; (l) Gibraltar's accountants did not cause Gibraltar to restate prior period results following Gibraltar's October 1987 lost announcement, and thereafter continued to issue "clean opinions" on Gibraltar's audited quarterly and annual financial statements notwithstanding the fact that such accountants knew that the FHLBB had concluded that Gibraltar was unsafe and unsound and questioned the ongoing viability of Gibraltar as a

public financial institution; (m) in August of 1988 and thereafter through September of 1989 Gibraltar's attorneys gave press interviews and otherwise reported to Gibraltar's securities holders the Gibraltar's management had done nothing wrong and such attorneys continued to provide legal representation and assistance to Gibraltar in the offer and sale of securities and the preparation and dissemination of such securities offering documents (through June of 1988) and in the drafting, preparation and dissemination of Gibraltar's securities disclosure/reporting documents (May 1989); (n) Gibraltar's management and attorneys publicly reported that the FHLBB's seizure of Gibraltar in late March of 1989 was unwarranted and wrongful; (o) following the seizure of Gibraltar by Government regulators, Gibraltar's management and attorneys failed and refused to call and hold any meetings of the shareholders of Gibraltar as required by applicable law; (p) Gibraltar's management, accountants, attorneys and public relations firms denied any wrongdoing in respect of Gibraltar's demise and the total loss of securities holders including without limitation the denial by Gibraltar that Gibraltar's real estate investments were not valued based on independent real estate appraisals, Gibraltar's several accountants' denials that they had participated in the audits of Gibraltar's financial statements and the issuance of reports and opinions thereon, Gibraltar's attorneys' continued denial and insistence that Gibraltar's management had done anything wrong or actionable and that such counsel was ethically entitled to continue representing both Gibraltar and Gibraltar's management in pending shareholder derivative, individual and class action lawsuits alleging wrongdoing by the persons constituting and comprising Gibraltar's management and the denial by Gibraltar's management, accountants attorneys and financial public relations firm that they had participated or aided and abetted Gibraltar's management in violations of applicable securities and related laws and thereby damaging Gibraltar and its securities holders. In investigating the facts and causes of action constituting and comprising this action, and in the initiation and prosecution of this action, the Plaintiffs and their counsel have relied upon the heretofore existing 3-years from date of discovery borrowed statute of limitations under applicable California and

Ninth Circuit law in respect of all of Plaintiffs' federal and state securities causes of action.

FIRST CAUSE OF ACTION
AGAINST ALL DEFENDANTS
FEDERAL SECURITIES LAWS VIOLATIONS
Section 10(b) and Rule 10b-51

105. Paragraphs 1 through 104 are realleged and incorporated by reference herein.

106. The false and misleading statements and the omissions as alleged herein constitute violations of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78a et al. and Rule 10b-5(b) promulgated thereunder, 17 C F.R. § 240.10b-5(b).

107. The Plaintiffs, and each of them, relied upon the false and misleading statements as alleged herein.

108. The Plaintiffs and each of them relied upon the fact that the public trading market price for the Company's securities was "efficient" and therefore reflected a reasonably accurate representation of the trading price and value of such securities unaffected by the public dissemination of any false and/or misleading statements and information or the omission of any material information regarding GFC and Gibraltar Savings and such corporations' results of operations, financial condition, property, management, regulatory relationships and business prospects (i.e., no "fraud on the market").

109. As a result of the false and misleading statements and the omissions as alleged herein, Plaintiffs, and each of them, have been directly and proximately damaged thereby in the purchase or sale of the securities of GFC and/or Gibraltar Savings and as more particularly alleged elsewhere in this Complaint; and the defendants, and each of them, are legally responsible for the Plaintiffs' damages.

110. The defendants, and each of them, employed and/or participated in employing or the employment of a device, scheme or artifice to defraud in respect of and in connection with Gibraltar and the purchase or sale of GFC and/or Gibraltar Saving's securities in violation of Section 10(b) of the securities Exchange Act and Rule lOb-5(a) promulgated thereunder (17 C.P.R. 1240.10b-5(a)].

111. The defendants, and each of them, engaged and/or participated in engaging in an act, practice or course of business which operated as a fraud and deceived Gibraltar's securities holders including the Plaintiffs in respect of Gibraltar and the purchase or sale of GFC and/or Gibraltar Savings' securities in violation of Section 10(b) of the Securities Exchange Act and Rule l0b-S(c) promulgated thereunder [17 C.P.R. § 240.10b-5(c)].

112. As a result of the wrongful and actionable conduct and activities as alleged in paragraphs 110 and 111 above, Plaintiffs, and each of them, have been directly and proximately damaged thereby in the purchase or sale of the securities of GFC and/or Gibraltar Savings as more particularly alleged elsewhere in this Complaint; and the defendants, and each of them, are legally responsible for the Plaintiffs' damages.

SECOND CAUSE OF ACTION
AGAINST ALL DEFENDANTS
AIDING AND ABETTING
FEDERAL SECURITIES LAW VIOLATIONS
(Section 10(b) and Rule l0b-5)

113. Paragraphs I through 104 are realleged and incorporated by reference herein.

114. Each of the defendants knowingly conspired and cooperated with and aided and abetted and rendered substantial assistance to GFC, Gibraltar Savings and each of the defendants in the securities laws violations alleged in the

Plaintiffs' First Cause of Action thereby rendering each of the defendants legally responsible to the Plaintiffs, and each of them, for damages as more particularly described elsewhere in this Complaint.

THIRD CAUSE OF ACTION
AGAINST ALL DEFENDANTS
PROXY FRAUD
(Section 14(a) and Rule 14a-9)

115. Paragraphs 1 through 104 are realleged and incorporated by reference herein.

116. In April of 1987 and April of 1988, GFC issued Proxy Statements dated, respectively, April 6, 1987 and April 8, 1988 for use in connection with the solicitation of proxies to be used by GFC's Board of Directors at, respectively, GFC's 1987 and 1988 Annual Meetings of Shareholders (collectively herein the "Proxy Statements").

117. The Proxy Statements were false and misleading with respect to material facts stated therein and omitted to state material facts necessary in order to make the statements therein not false or misleading and/or necessary to correct statements contained in such Proxy Statements when such statements were rendered false and/or misleading by the passage of time and/or the occurrence of certain events subsequent to the time such Proxy Statements were first issued by GFC and GFC's Board of Directors and before the proxies solicited and obtained by GFC's Board of Directors were actually used and voted in respect of any of the matters which were the subject of such Proxy Statements or otherwise in violation of Section 14(a) of the Securities Exchange Act 15 USC § 78n(a) and Rule 14a-9 promulgated thereunder (17 § C.F.R. i 240.14a-9).

118. Knowing that GFC's 1987 Proxy Statement was false and misleading as previously alleged elsewhere in this Complaint, and should have been revised,

118. Knowing that GFC's 1987 Proxy Statement was false and misleading as previously alleged elsewhere in this Complaint, and should have been revised, re-issued and re-circulated prior to the time that the GFC Board of Directors voted the proxies obtained as a result of such false and misleading Proxy Statement at GFC's 1987 Annual Meeting of Shareholders as previously alleged elsewhere in this Complaint, an attorney representing Gibson Dunn (Gelbert) in attendance at such Meeting nevertheless advised that voting of the proxies obtained as a result of such false and misleading Proxy Statement could properly proceed without the necessity of revising or otherwise re-issuing and circulating such 1987 Proxy Statement; and such attorney specifically represented to the Meeting that the statement contained in the GFC Proxy Statement, that the GFC Board of Directors was not aware of any claims, threatened or pending, against the persons to be covered by the proposed retroactive indemnity agreements, was accurate at the date of the Proxy Statement and continued to be accurate through the time of the Meeting.

119. The Proxy Statements were false and misleading in the following material respects, among others:

(1) 1987 Proxy Statement:

(i) Failed to state or otherwise disclose the existence of claims, and/or the factual and legal basis for the existence and possible assertion of claims, against the persons serving as officers and directors for GFC and Gibraltar Savings, including the nominees for re-election to GFC's Board of Directors, who were to be covered by the special retroactive indemnity and hold harmless agreements proposed and recommended by GFC's Board of Directors;

(ii) Failed to state or otherwise disclose the existence of substantial unreported losses attributable to Gibraltar's commercial real estate activities and investments and portfolio of mortgage-backed and other securities resulting in the

over statement of Gibraltar's prior earnings, shareholders equity and book value per share;

(iii) Failed to state or otherwise disclose that Gibraltar had issued two different sets of audited consolidated financial statements for the year ended and as at December 31, 1986 and that the earlier version of such audited financial statements as provided to the SEC had been subsequently revised and changed and that the second ("bogus") version of such audited financial statements failed to identify the changes which had been made, the results of such changes and the reasons therefor;

(iv) Failed to state or otherwise disclose that the purchase price proposed to be paid for the acquisition by GFC of First Savings Bank of Florida exceeded GFC's total cash and tangible net worth, and that payment by GFC in the approximate amount of $115 million cash to acquire First Savings Bank of Florida would require GFC to sell assets or borrow funds from Gibraltar Savings;

(v) Failed to state or otherwise disclose that GFC was obligated under a capital maintenance (net worth) agreement with the FHLBB to maintain minimum required capital (net worth) of GFC'S Gibraltar Savings and Gibraltar Savings of Washington savings and loan subsidiaries which capital maintenance agreement and undertaking would apply to First Savings Bank of Florida following GFC's acquisition of such Florida savings and loan;

(vi) Failed to state or otherwise disclose that the FHLBB had notified GFC and/or Gibraltar savings as to certain objections the FHLBB had in respect of the proposed acquisition of First Savings Bank of Florida including the use of Gibraltar Savings' cash resources to consummate such acquisition by GFC;

(vii) Failed to state or otherwise disclose that the FHLBB had required Gibraltar to enter into an

agreement restricting GFC's ability to cause Gibraltar Savings to declare and pay cash dividends to GFC which were previously the primary source for payment of interest on GFC's outstanding public debt securities and as cash dividends on GFC's Common Stock; and

(viii) Failed to state or otherwise disclose facts material to the qualification, competence and fitness of the various nominees for election to GFC's Board of Directors to serve in such capacity.

(2) 1988 Proxy Statement:

(i) Failed to state or otherwise disclose the existence of claims, and/or the factual and legal basis for the existence and possible assertion of claims, against the persons serving as directors and officers of GFC and Gibraltar Savings and proposed for re-election to GFC's Board of Directors, and for mismanagement, violation of federal securities laws and other wrongful and actionable conduct and activities by such persons;

(ii) Failed to state or otherwise disclose that the FHLBB had been critical of the performance of GFC and Gibraltar Savings' management, and had suggested and requested a change of such management; and

(iii) Failed to state or otherwise disclose certain facts material to the qualification, competence and fitness of the various nominees for election to GFC's Board of Directors to serve in such capacity.

119A. Each of the proxy defendants, allowed their names to be used to solicit proxies through the use of such false and misleading Proxy Statements, was actively involved in the solicitation of proxies through the use of such Proxy Statements or other information prepared and/or circulated with such Proxy Statements which constituted proxy solicitation

materials and proxy solicitations under applicable SEC law, rules and/or regulations.

119B. Gibraltar's year-end press releases and Annual Reports To Shareholders were part of Gibraltar's proxy solicitation materials for GFC's 1987 and 1988 Annual Meetings of Shareholders; and, for example, Gibson Dunn's (Gelberts) statements at the 1987 Annual Meeting and the reference to Gibson Dunn in GFC's 1987 Proxy Statement, as authorized and approved by Gibson Dunn, were part of Gibraltars proxy solicitation efforts for the 1987 Meeting and the solicitation of proxies for use at such meeting; the reference to Ernst and Peat in GFC's 1987 proxy solicitation materials, as authorized and approve d by such accounting firms, were part of GFC's proxy solicitation efforts for the 1987 Meeting and the solicitation ,of proxies for use at such Meeting; and the Rifkind Defendants' dissemination of Gibraltar's 1986 year-end audited results press release under Rifkind's name was party of GFC's proxy solicitation efforts for the 1987 Annual Meeting and the solicitation of proxies for use at such Meeting.

120. GFC'S Board of Directors proceeded to take action, including the voting of shares of GFCIB Common Stock, pursuant to the authority obtained through the use of such false and misleading Proxy Statements without issuing any clarifying and/or correcting information and without re-issuing and resubmitting for subsequent action by GFC's shareholders the matters and authority which had been previously referenced and obtained by virtue of the GFC Board's prior false and/or misleading Proxy Statements.

121. Plaintiff Glavaris was a shareholder of GFC and received the Proxy Statements and, upon his best recollection, information and belief, executed and returned the proxies solicited by the GFC's Board through the use of such false and/or misleading Proxy Statements voting in favor of the GFC Board's recommendations and request for proxies in respect thereof.

122. Glavaris did not know that the Proxy Statements were false or misleading or in what respects, and Glavaris relied upon GFC's Board, and GFC's attorneys and independent accountants/auditors and shareholder communications professionals to issue proxy statements which were accurate and complete in all material respects and were otherwise in compliance with all applicable laws, rules and regulations pertaining to such proxy statements and proxy solicitations, including that such Proxy Statements be revised and updated prior to the time proxies obtained thereby are actually voted to ensure that all information contained therein is accurate and complete as of the time that such proxies are actually voted and otherwise used and/or relied upon to consummate any of the transactions and/or actions which were authorized and/or otherwise approved through the voting and use of such proxies.

123. As a result of the use of the false and misleading Proxy Statements by GFC's Board and the defendants named herein, Glavaris and all of the other GFC shareholders were directly and proximately injured and damaged as a result of such false and/or misleading Proxy statements as more particularly alleged herein and elsewhere in this Complaint inciting without limitation the dimunition in the value of their securities as a result of the expenditure by GFC of approximately $115 million in cash to acquire First Savings Bank of Florida at a time when GFC was undercapitalized and suffering a liquidity problem; and the defendants, and each of them, are legally responsible for the Plaintiff's damages.

FOURTH CAUSE OF ACTION
AGAINST ALL DEFENDANTS
AIDING AND ABETTING
PROXY FRAUD
Section 14(a) and Rule 14a-91

124. Paragraphs 1 through 104 and paragraphs 116 through 123 are realleged and incorporated by reference herein.

125. The Defendants, and each of them, knowingly conspired and cooperated with and aided and abetted and rendered substantial assistance to each of the defendants and GFC in the securities violations alleged in the Plaintiff's Third Cause Of Action For Proxy Fraud thereby rendering each of the defendants legally responsible to the Plaintiffs, and each of them, for damages as more particularly described elsewhere in this Complaint.

FIFTH CAUSE OF ACTION
AGAINST THE RICO DEFENDANTS
RICO VIOLATIONS
(18 U.S.C. 1961 et seq.)

126. Paragraphs 1 through 104 are realleged and incorporated by reference herein including without limitation the "RICO Allegations" as set forth in this Complaint at paragraphs 77 through 89.

127. The RICO Defendants, and each of them, as a result of the allegations as set forth herein are legally responsible,to the Plaintiffs, and each of them, for damages as more particularly described elsewhere in this Complaint, trebled, and for the Plaintiffs' attorneys fees and costs paid and/or incurred in prosecuting this RICO action in accordance With 18 U.S.C. § 1964(C).

SIXTH CAUSE OF ACTION
AGAINST ALL DEFENDANTS
(Except the Rifkind Defendants)
BREACH OF FIDUCIARY OR PROFESSIONAL DUTY
(Pendent State Claim)

128. Paragraphs 1 through 104, and paragraphs 116 through 123, are realleged and incorporated by reference herein.

129. The defendants, and each of then except for the Rifkind Defendants, by virtue and as a result of the

positions of trust and confidence they held with GFC and/or Gibraltar Savings, statutory, common law duties and/or responsibilities and/or the professional relationship that existed between such defendants and Gibraltar including its securities holders, were in a fiduciary or professional relationship with and owed fiduciary or professional duties of loyalty, care, candor, truthfulness and timely disclosure to GFC and Gibraltar Savings and its securities holders, including the Plaintiffs and each of them.

130. Additionally, such defendants, and each of them, failed to timely and properly inform the Plaintiffs, and each of them, in respect of the true business and/or financial affairs and condition of GFC and Gibraltar Savings motivated, in substantial part, by such parties' desire to maintain, continue and perpetuate their own titles, offices, positions, employment and professional relationships (contractual and otherwise) with the Company and the financial and other remuneration and benefits accruing to such party defendants as a result thereof.

131. The actions of such defendants, and each of them, as alleged herein constituted a breach of such defendants' fiduciary or professional duties of loyalty, care, candor, truthfulness and timely disclosure to GFC and/or Gibraltar Savings and to GFC and Gibraltar Savings' securities holders, including the Plaintiffs in this action.

132. The Plaintiffs, and each of them, were directly and proximately injured and damaged by the actions of the defendants, and each of them, as alleged and more fully described elsewhere in this Complaint.

133. As a result of the professional relationship existing between and involving Gibson Dunn, Gibraltar and Gibraltar's securities holders, and the superior knowledge gained by Gibson Dunn as a result of such professional relationship and services and Gibraltar's securities holders' dependence and reliance upon the performance of Gibson Dunn's professional

duties to and on their behalf, Gibson Dunn owed duties to Gibraltar's securities holders and the public trading market for Gibraltar's securities to ensure that all public statements by Gibraltar affecting the offer, sale and trading in such securities were accurate and complete in all material respects to the best of Gibson Dunn's knowledge.

SEVENTH CAUSE OF ACTION
AGAINST ALL DIRECTOR DEFENDANTS
BREACH OF STATUTORY DUTY
(California Financial Code Section 6150)

134. Paragraphs 1 through 104 are realleged and incorporated by reference herein.

135. Defendants Young, Thayer, Janis, Williamson, Sprague Flournoy, Hutter, Spitz and Vega served as directors of GFC and Gibraltar Savings during the period covered by this Complaint and are herein defined collectively and individually as the "Director Defendants".

136. The actions and conduct of the Director Defendants, and each of them, as alleged in this Complaint constituted violations of their legal duties, responsibilities and obligations under section 6150 of the California Financial Code.

137. Such breach of statutory duty entitles the Plaintiffs, as the holders of GFC and Gibraltar Savings' securities during the period covered by this Complaint, to recover their damages caused by the Director Defendants' breach of the statutory duties and obligations as provided for in California Financial Code Section 6150 for the benefit of such securities holders.

138. Plaintiffs, and each of them, have been directly and proximately injured and damaged as a result of the Director Defendants' failure to comply with, perform and satisfy their duties, responsibilities and obligations under California Financial Code Section 6150, and the Plaintiffs, and each of them,

are entitled to recover damages from the Director Defendants, and each of them, as more particularly described elsewhere in this Complaint.

EIGHTH CAUSE OF ACTION
AGAINST ALL DEFENDANTS
FRAUD AND DECEIT
(Cal. Civ. Code § 1572)

139. Paragraphs 1 through 104, and paragraphs 116 through 123, are realleged and incorporated by reference herein 140. The defendants, and each of them, intentionally made and caused GFC and Gibraltar Savings to make fraudulent statements to GFC and/or Gibraltar Savings' securities holders, including the Plaintiffs, as alleged herein.

140. The defendants, and each of them, intended that the Plaintiffs, and all of Gibraltar's securities holders as a group including the Plaintiffs, rely upon the false and misleading statements being made by the defendants in making investment decisions regarding GFC and Gibraltar Savings' securities, and Plaintiffs, and each of them, did reasonably rely upon such fraudulent statements by defendants in formulating the Plaintiffs' investment decisions to purchase, sell and/or hold securities of GFC and/or Gibraltar Savings, and the Plaintiffs were directly and proximately injured and damaged thereby and are entitled to recover their damages including prejudgment interest, plus exemplary and/or punitive damages as alleged elsewhere in this Complaint.

NINTH CAUSE OF ACTION
AGAINST ALL DEFENDANTS
(Except the Rifkind Defendants)
CONSTRUCTIVE FRAUD AND DECEIT
(Cal. Civ. Code § 1573)

142. Paragraphs I through 104, and paragraphs 116 through 123, are realleged and incorporated by reference herein.

143. As a result of their titles, offices, positions employment status and/or professional relationship with GFC and/or Gibraltar Savings and Gibraltar's securities holders, the defendants and each of them except for the Rifkind Defendants, were in a fiduciary or professional relationship with GFC and/or Gibraltar Savings and Gibraltar's securities holders including the Plaintiffs and thereby owed a duty of loyalty, care, candor and truthfulness to the Plaintiffs, and each of them.

142A. During the period covered by this Complaint, such defendants owed the following duties to the Plaintiffs:

A. Fiduciary Duties. Defendants Young, Thayer, Janis, Williamson, Nussbaum, Mooney, Crawford, Blount, Sprague, Flournoy, Hutter, Spitz, Vega, Post, Boyle, Glupker, Rawlings, Dudley, Ernst, Kang, Peat, Sprayregen, and Leventhal owed fiduciary duties to Gibraltar and its securities holders; and

B. Professional Duties. Defendants Nussbaum, Mooney, Crawford, Glupker, Rawlings, Dudley, Ernst, Kang, Peat, Sprayregan, Leventhal and Gibson Dunn owed professional duties to Gibraltar and its securities holders.

144. By their actions and conduct, as alleged herein, such defendants, and each of them, breached their fiduciary or professional duties to the Plaintiffs, and each of them, and such wrongful actions and conduct, under the facts and circumstances alleged herein, constituted constructive fraud and deceit by such Defendants against such Plaintiffs, and each of them, and against Gibraltar's securities holders as a group.

145. The Plaintiffs, and each of them, were directly and proximately injured by such fraudulent and deceptive activities and conduct of such defendants, and each of them, and are entitled to recover their damages including prejudgment interest, plus exemplary and/or punitive damages, as alleged elsewhere in this Complaint as against such defendants, and each of them.

TENTH CAUSE OF ACTION AGAINST DEFENDANTS ERNST, DUDLEY, PEAT, KANG, LEVENTHAL, SPRAYREGEN, THE RIFKIND FIRM RIFKIND AND GIBSON DUNN FOR NEGLIGENCE (Pendent State Claim)

146. Paragraphs 1 through 104, and paragraphs 116 through 123, are realleged and incorporated by reference herein.

147. As a result of their actions and conduct as alleged herein, defendants Ernst, Dudley, Peat, Kang, Leventhal, Ssprayregen, the Rifkind Firm, Rifkind and Gibson Dunn, and each of them, made and/or caused to be made or were negligent in failing to make or causing to be made or corrected certain statements, representations and/or assurances to GFC and Gibraltar Savings' securities holders including Plaintiffs'which such defendants know, or should have known after reasonable inquiry and were therefore careless in not knowing, at the time of making and/or failing to make such statements, representations and/or assurances, were not accurate and complete in all material respects and/or were necessary in order to avoid making the statements, representations and/or assurances which were made from being materially false and/or misleading.

148. The defendants, in making or causing to be made such false and/or misleading statements, and/or in failing to make statements which were required to avoid making statements that had been made false and/or misleading or to correct such statements, intended or reasonably should have known the false and/or misleading nature of the statements made and/or not made and that the Plaintiffs, and each of them, would receive such false and/or misleading statements that were being made and were rendered false and/or misleading by the absence of certain further statements in formulating investment decisions regarding among other things, the purchase, holding and/or sale of GFC and/or Gibraltar Savings, securities.

149. Plaintiffs, and each of them, received and relied upon such false and/or misleading statements made, and/or were deprived of certain information that should have been stated or

otherwise made by the defendants, or caused to be made or omitted by the defendants, and each of them, and were directly and proximately injured and damaged thereby as more particularly described elsewhere in this Complaint.

ELEVENTH CAUSE OF ACTION
AGAINST ALL DEFENDANTS NEGLIGENT
MISREPRENSENATION
(Pendent State claim)

150. Paragraphs 1 through 104, and paragraphs 116 through 123, are realleged and incorporated by reference herein.

151. As a result of their actions and conduct as alleged herein, the defendants, and each of them, made and/or caused to be made certain statements, representations and/or assurances to GFC and Gibraltar Savings' securities holders including the Plaintiffs both individually and as a group, which such defendants knew, or should have known after reasonable inquiry and therefore were careless in not knowing, at the time of making such statements representations and/or assurances, were false and/or misleading and constituted actionable misrepresentations.

152. The defendants in making or causing to be made such false and/or misleading statements intended or reasonably should have known that the securities holders of GFC and/or Gibraltar Savings including the Plaintiffs, and each of them, would receive and rely thereon in formulating investment decisions regarding, among other things, the purchase, holding and/or sale of GFC and/or Gibraltar Savings' securities.

153. Plaintiffs, and each of them, received and relied upon such false and/or misleading statements as made or caused to be made by the defendants, and were directly and proximately injured and damaged thereby as more particularly described elsewhere in the Complaint.

TWELFTH CAUSE OF ACTION
AGAINST THE GIBRALTAR OFFICER AND DIRECTOR
DEFENDANTS FALSE AND MISLEADING
ADVERTISING
(California Business and)
(Professions Code § 17500, et seq.)

154. Paragraphs 1 through 104 are realleged and incorporated by reference herein.

155. As a result of their actions and conduct as alleged herein. Defendants Young, Thayer, Janis, Williamson, Nussbaum Mooney, Crawford, Blount, Sprague, Flournoy, Hutter, Spitz, Vega, Post, Boyle, Glupker, Rawlings and Harrison (herein collectively and individually referred to as the "Gibraltar Defendants" for purposes of this Twelfth Cause of Action and Plaintiff's Thirteenth Cause Of Action as set forth in this Complaint), made or caused to be made false and/or misleading advertising and other similar communications to the general public, including the Plaintiffs, and each of them, which advertising and other similar communications (herein collectively "advertising") the Gibraltar Defendants knew or should have known after reasonable inquiry, and therefore were careless in not knowing, were false and/or misleading in violation of California Business and Professions Code § 17 500, et seq.

156. The Gibraltar Defendants in making, or causing to be made, such false and/or misleading advertising intended or reasonably should have known that such advertising.would be received and relied upon by Plaintiffs in formulating their investment decisions concerning, among other things, the purchase, holding and the sale of the Gibraltar's securities.

157. Plaintiffs, and each of them, received and relied upon such advertising and were directly and proximately

injured and damaged thereby as more particularly described elsewhere in this Complaint.

THIRTEENTH CAUSE OF ACTION
AGAINST THE GIBRALTAR OFFICER AND DIRECTOR DEFENDANTS AND GIBRALTAR SAVINGS STATE SECURITIES LAW VIOLATIONS
(California state securities Laws)

158. Paragraphs 1 through 104 are realleged and incorporated by reference herein.

159. As a result of their actions and conduct as alleged herein, the Gibraltar Defendants and Gibraltar Savings, and each of them, made, participated in making, caused to be made, and/or aided and abetted one or more of such other defendants in the making of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading in violation of California state securities laws including without limitation under the "Fraudulent and Prohibited Practices" (Sections 25400, and Enforcement (Sections 25500, et seq.) provisions of the California Corporate Securities Law.

160. Plaintiffs, and each of them, were directly and proximately injured and damaged as a result of such wrongful actions and conduct as more particularly described elsewhere in this Complaint.

FOURTEENTH CAUSE OF ACTION
AGAINST DEFENDANTS YOUNG AND WILLIAMSON
CONTROLLING PERSON LIABILITY
FOR FEDERAL SECURITIES LAW VIOLATIONS
(Section 20(a))

161. Paragraphs 1 through 104, and paragraphs 116 through 123, are realleged and incorporated by reference herein.

162. GFC and Gibraltar Savings committed violations of the federal securities laws as alleged elsewhere in this complaint, including violations of Section 10(b) of the Securities Exchange Act, and Rule 10b-5 promulgated thereunder, and Section 14(a) and Rule 14a-9 promulgated thereunder, during the period January 11 1986 through at least March 3, 1988.

163. At the times that GFC and Gibraltar savings committed such federal securities laws violations, defendants Young and Williamson were, by virtue of and as a result of their positions and titles with Gibraltar, the tenure of their employment and scope of their management duties, responsibilities and activities for Gibraltar combined with their stock ownership in GFC, controlling persons of GFC (and thereby Gibraltar Savings) as defined in Section 20(a) of the Securities Exchange Act. 15 USC § 78t(a).

164. As controlling persons under Section 20(a) of the Securities Exchange Act, defendants Young and Williamson are each liable jointly and severally with and to the same extent as GFC and/or Gibraltar Savings are liable to the Plaintiffs and Gibraltar's other securities holders for violations by GFC and Gibraltar Savings of the federal securities laws which occurred prior to March 4, 1988.

FIFTEENTH CAUSE OF ACTION
AGAINST DEFENDANTS THAYER AND JANIS
CONTROLLING PERSON LIABILITY
FOR FEDERAL SECURITIES LAW VIOLATIONS
(Section 20(a))

165. Paragraphs 1 through 104, and paragraphs 116 through 123, are realleged and incorporated by reference herein.

166. GFC and Gibraltar Savings committed violations of the federal securities laws as alleged elsewhere in this Complaint, including violations of Section 10(b) of the Securities Exchange Act, and Rule 10b-5 promulgated thereunder, and Section 14(a) and Rule 14a-9 promulgated thereunder, during the period March 4, 1988 through December 31, 1988.

167. At the time that GFC and Gibraltar Savings committed such federal securities law violations, defendants Thayer and Janis were, by virtue of and as a result of their positions and titles with Gibraltar and the tenure of their services to and the scope of their duties and responsibilities for Gibraltar, controlling persons of GFC (and thereby Gibraltar Savings) as defined in Section 20(a) of the Securities Exchange Act, 15 USC § 78t(a).

168. As controlling persons under Section 20(a) of the Securities Exchange Act, defendants Thayer and Janis are each liable jointly and severally with and to the same extent as GFC and Gibraltar Savings are liable to the Plaintiffs and Gibraltar's other securities holders for violations by GFC and Gibraltar Savings of the federal securities laws which occurred prior to January 1, 1989.

SIXTEENTH CAUSE OF ACTION AGAINST DEFENDANTS THAYER, SPITZ AND FLOURNOY CONTROLLING PERSON LIABILITY FOR FEDERAL SECURITIES LAW VIOLATIONS

169. Paragraphs 1 through 104, and paragraphs 116 through 123, are incorporated by reference herein.

170. GFC committed violations of the federal securities laws as alleged elsewhere in this Complaint, including violations of Section 10(b) of the Securities Exchange Act, and Rule 10b-5 promulgated thereunder, during the period January 1, 1989 through October 31, 1989.

171. At the time that GFC committed such federal securities law violations, defendants Thayer, Flournoy and Spitz were, by virtue of and as a result of their positions and titles with GFC and the tenure of their services to and the scope of their duties and responsibilities for GFC, controlling persons of GFC as defined in Section 20(a) of the Securities Exchange Act, 15 USC § 78t(a).

172. As controlling persons under, Section 20(a) of the securities Exchange Act, defendants Thayer, Flournoy and

Spitz are each liable jointly and severally with and to the same extent as GFC is liable to the Plaintiffs and Gibraltar's other securities holders for violations by GFC of the federal securities laws which occurred prior to November 1, 1989.

DEMAND FOR RELIEF

WHEREFORE, the Plaintiffs pray for judgment and other relief on the complaint, as follows:

1. On the First Cause of Action (Federal Securities Laws Violations, Section 10(b) and Rule 10b-5 Against All Defendants), damages according to proof at trial and interest, including prejudgment interest, thereon.

2. On the Second Cause of Action (Aiding and Abetting, Section 10(b) and Rule 10b-5 Violations Against All Defendants), damages according to proof at trial and interest, including prejudgment interest, thereon.

3. On the Third Cause of Action (Proxy Fraud, Section 14(a) and Rule 14a-9 Against All Defendants), damages according to proof at trial and interest, including prejudgment interest, thereon plus costs of suit including reasonable attorneys' fees and costs.

4. On the Fourth Cause of (Action Aiding And Abetting Proxy Fraud, Section 14(a) and rule 14a-9 Against All Defendants), damages according to proof at trial and interest, including prejudgment interest, thereon plus costs of suit including reasonable attorneys' fees and costs.

5. On the Fifth Cause of Action (RICO Against The RICO Defendants), threefold damages according to proof at trial and costs of suit including reasonable attorneys' fees and costs.

6. On the Sixth Cause of Action (Breach of Fiduciary or Professional Duty Against All Defendants Except the Rifkind Defendants), damages according to proof at trial, interest

thereon including prejudgment interest, costs of suit including reasonable attorneys' fees and costs and exemplary and/or punitive damages.

7. On the Seventh Cause of Action (Breach of Statutory Duty Against All Director Defendants), damages according to proof at trial and interest, including prejudgment interest, thereon.

8. On the Eighth Cause of Action (Fraud and Deceit Against All Defendants), damages according to proof at trial, interest thereon including prejudgment interest, costs of suit including reasonable attorneys' fees and costs and exemplary and/or punitive damages.

9. On the Ninth Cause of Action (Constructive Fraud and Deceit Against All Defendants Except the Rifkind Defendants), damages according to proof at trial, interest thereon including prejudgment interest, costs of suit including reasonable attorneys' fees and costs and exemplary and/or punitive damages.

10. On the Tenth Cause of Action (Negligence Against Defendants Ernst, Dudley, Peat, Kang, Leventhal, Sprayregen, the Rifkind Firm, Rifkind and Gibson Dunn), damages according to proof at trial and interest, including prejudgment interest, thereon.

11. On the Eleventh Cause of Action (Negligent Misrepresentation Against All Defendants), damages according to proof at trial and interest, including prejudgment interest, thereon.

12. On the Twelfth Cause of Action (False and Misleading Advertising Against The Gibraltar officer And Director Defendants) damages according to proof at trial and interest, including prejudgment interest, thereon.

13. On the Thirteenth Cause of Action (State securities Law Violations Against The Gibraltar Officer And Director Defendants and Gibraltar Savings), damages according

to proof at trial and interest, including prejudgment interest, thereon.

14. On the Fourteenth Cause of Action (Controlling Person Liability For Federal Securities Law Violations Against Defendants Young and Williamson), damages according to proof at trial and interest, including prejudgment interest, thereon.

15. On the Fifteen Cause of Action (Controlling Person Liability For Federal Securities Law Violations Against Defendants Thayer and Janis), damages according to proof at trial and interest, including prejudgment interest, thereon.

16. On the Sixteenth Cause of Action (Controlling Person Liability For Federal Securities Law Violations Against Defendants Thayer, Spitz and Flournoy), damages according to proof at trial and interest, including prejudgment interest, thereon. And, unless otherwise specifically requested above, costs of suit, together with such other and further relief as the Court shall determine is fair, just and appropriate under the facts and circumstances of this case.

Dated: June 24, 1991

Respectfully submitted,

ROBERT H. BRETZ, P.C.

By:/s/ROBERT H. BRETZ

Robert H. Bretz,
Attorneys for Plaintiffs

DEMAND FOR JURY TRIAL

Plaintiffs, and each of them, hereby demand trial by Jury pursuant to Rule 38(b) of the Federal Rules of Civil Procedure.

Dated: June 24, 1991

Respectfully Submitted,

ROBERT H. BRETZ, P.C.

BY:/s/ ROBERT H. BRETZ
Robert H. Bretz,
Attorneys for Plaintiffs

PROOF OF SERVICE

I am a citizen of the United States, over the age of 18 years, employed in the County of Los Angeles, and not a party to.the within action; my business address is 520 Washington Blvd., #428, Marina del Rey, California 90292.

On June 24, 1991 I served the within SECOND AMENDED COMPLAINT by personally depositing a true copy thereof in the United States Mail, first class postage prepaid, enclosed in a sealed envelope addressed to the following:

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I declare, under penalty of perjury, that the foregoing is true correct.

Executed on June 24, 1991 at Marina del Rey, California.

/s/STACIE NERONI
Stacie Neroni

Supreme Court, U.S.
FILED
SEP 30 1998
OFFICE OF THE CLERK

No. 98-389

In The

Supreme Court of the United States

October Term, 1997

JOHN AND PATRICIA GLAVARIS; BENNY L. TOLLEY; JOEL BINDER; MARIT FIDEL; BERNARD FIDEL,

Petitioners,

vs.

HERBERT J. YOUNG; *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Respondent Gibson, Dunn & Crutcher LLP is a California limited liability partnership that has no parent company, subsidiaries or affiliates.

Respondents Herbert J. Young, James N. Thayer, Jay Janis, John R. Williamson, Michael W. Mooney, Lynne Crawford, Linda K.S. Blount, Robert R. Sprague, Houston I. Flournoy, Bernice H. Hutter, Melvin P. Spitz and Rafael E. Vega have no parent companies, subsidiaries or affiliates.

Respondents Gibson, Dunn & Crutcher LLP, Herbert J. Young, James N. Thayer, Jay Janis, John R. Williamson, Michael W. Mooney, Lynne Crawford, Linda K.S. Blount, Robert R. Sprague, Houston I. Flournoy, Bernice H. Hutter, Melvin P. Spitz and Rafael E. Vega respectfully submit this opposition to petitioners John and Patricia Glavaris, Benny L. Tolly, Joel Binder, Marit Fidel and Bernard Fidel's Petition for Writ of Certiorari.

STATUTORY PROVISIONS INVOLVED

In addition to the statutes and rules cited in the Petition, the following California statutes are involved in this case, as they form the basis for the district court's decision (affirmed by the Ninth Circuit) that certain of the federal and state claims asserted in the complaint were time-barred:

California Code of Civil Procedure § 335

> "The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:"

California Code of Civil Procedure § 338(d)

> "Within three years:
>
> (d) An action for relief on the ground of fraud or mistake. The cause of action in that case is not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

California Code of Civil Procedure § 339

> "Within two years: 1. An action upon a contract, obligation or liability not founded upon an instrument of writing. . . ."

California Corporations Code § 25506

> "No action shall be maintained to enforce any liability created under [certain provisions of the Corporate Securities Law of 1968] unless brought before the expiration of four years after the act or transaction constituting the violation or the expiration of one year after the discovery by the plaintiff of the facts constituting the violation, whichever shall first expire."

REASONS FOR DENYING THE WRIT

The Petition raises no federal issues worthy of this Court's consideration. The Ninth Circuit's unpublished memorandum decision neither decided any novel federal questions nor conflicts with any decision of another circuit. The Ninth Circuit simply affirmed the district court's rulings, contained in two lengthy, fact-bound and similarly unpublished memoranda decisions (*see* Appendix 1d-78d, 1e-117e) "for the reasons set forth by the district court" without itself articulating *any* rules of law. *See* Ninth Circuit's Memorandum filed Feb. 19, 1998 at Appendix 4a. For this reason alone, and for the following additional good reasons, the Petition should be denied.

- The primary issue raised below and in the Petition — *i.e.*, whether the district court correctly dismissed petitioners' federal securities law claims based on the statute of limitations — is moot. This case, brought for violations of Section 10(b) of the Securities Exchange Act of 1934, was filed on

November 16, 1990, before this Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991). Accordingly, the *Lampf* statute of limitations did not apply to petitioners' federal securities fraud claims.[1] *See* 15 U.S.C. § 78aa-1. The district court therefore correctly followed applicable Ninth Circuit precedent by applying California's three year state law limitations period (Cal. Code Civ. Proc. § 338(d)) to this action. Because the *Lampf* statute of limitations — rather than California's three year fraud period of limitations — applies to all private civil actions commenced under Section 10(b) after June 19, 1991, review by this Court of the district court's application of the California state law statute, and the Ninth Circuit's affirmance thereof, would have no precedential value whatsoever.

• Petitioners' request that this Court review the district court's decision to re-define the class period into subclasses is not worthy of review for two reasons. First, Federal Rule of Civil Procedure 23(c)(4)(B) expressly authorizes district courts — and authorized the district court here — to subdivide the class period based upon the court's analysis of the particular facts of this case. *See* Fed. R. Civ. P. 23(c)(4)(B) ("When appropriate . . . a class may be divided into subclasses and each subclass treated as a class. . . ."). *See also* Memorandum of Decision filed Sept. 10, 1992 at Appendix 20d-25d (analysis of petitioners' "fraud on the market" theory of reliance and the significant interim public disclosures during the purported class period in this case). Second, this Court and the circuit courts have uniformly held that a district court may split a proposed class into subclasses when the facts and circumstances suggest that doing so would be appropriate.[2]

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1. Petitioners do not contend otherwise.

2. *See United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 408 (1980) (district court may consider appropriateness of subclasses, but has (Cont'd)

The district court here applied these settled principles of law to the factual allegations of petitioners' complaint. There is no reason for this Court to reconsider this fact-bound question.

- Petitioners' contentions (a) that they were entitled to tolling under this Court's *American Pipe* doctrine[3] (*see* Petition at i) and (b) that Messrs. Binder and Fidel should have been permitted to intervene in this case to resurrect claims dismissed by the district court (*see* Petition at 17) are not worthy of review. In deciding these two questions, the district court merely applied settled rules of law to the facts and circumstances of this case. *See* Second Memorandum of Decision filed Aug. 11, 1994 at Appendix 49e-55e, 75e-87e. Petitioners make no showing to the contrary. Because petitioners' only assertion of error consists of the district court's (and the Ninth Circuit's) purported misapplication in this unique case of settled legal principles, the Petition does not satisfy any of the criteria which would justify granting review on certiorari. *See* Supreme Court Rule 10.

- The Ninth Circuit's decision in this case does not, as petitioners assert, conflict with a decision of the Third Circuit Court of Appeals concerning the requirements for pleading the existence of a RICO "enterprise." *See* Petition at 26-27;

(Cont'd)
no *sua sponte* obligation to do so). *See also In re Syntex Corp. Sec. Litig.*, 95 F.3d 922, 935 (9th Cir. 1996) (treating subclasses differently for statute of limitations purposes because different market conditions existed at various times during the purported class period); *Lundquist v. Security Pac. Automotive Fin. Servs. Corp.*, 993 F.2d 11, 14 (2d Cir. 1993); *Mendoza v. United States*, 623 F.2d 1338, 1350 (9th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981); *Geraghty v. United States Parole Comm'n*, 579 F.2d 238, 253 (3d Cir. 1978), *vacated on other grounds*, 445 U.S. 388 (1980); *Carr v. Conoco Plastics, Inc.*, 423 F.2d 57, 58 (5th Cir.), *cert. denied*, 400 U.S. 951 (1970).

3. *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974).

18 U.S.C. § 1961(4). The Ninth Circuit affirmed the district court's dismissal of petitioners' RICO claims without even mentioning the RICO "enterprise" issue. Accordingly, this is hardly an appropriate case for this Court to consider the pleading requirements for a RICO "enterprise."[4]

- The remaining issues raised by petitioners assert error with respect to (a) the district court's fact-bound analysis of the allegations of petitioners' 154 page Second Amended Complaint, (b) the district court's fact-based conclusion that petitioners failed adequately to plead a cause of action for violation of Section 10(b) or for state law fraud or negligent misrepresentation, and (c) the district court's application of state law concerning inquiry notice, fiduciary duty, fraudulent concealment and equitable estoppel. None of these fact-specific questions, and in particular none of the California state law issues decided in this case, satisfy Rule 10 criteria.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

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4. Petitioners are also incorrect in their assertions (*see* Petition at 26 n. 16) that "[p]rior to [this case], the Ninth Circuit had not previously had the occasion to address [the RICO enterprise] issue" and that the Third Circuit subscribes to a different approach. *See Chang v. Chen*, 80 F.3d 1293, 1298 (9th Cir. 1996) (adopting majority view that a RICO enterprise must "have an ascertainable structure separate and apart from the pattern of racketeering activity in which it engages"); *United States v. Pelullo*, 964 F.2d 193, 211-12 (3d Cir. 1992) (same). Indeed, *Chang* expressly adopts the RICO enterprise pleading requirements set forth by the Third Circuit in *United States v. Riccobene*, 709 F.2d 214 (3d Cir.), *cert. denied*, 460 U.S. 849 (1983). *See Chang*, 80 F.3d at 1299.

Dated: September 30, 1998

Respectfully submitted,

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